THE CONSTITUTION OF THE UNITED STATES

An Historical Survey of Its Formation

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An Historical Survey of Its Formation

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FOREWORD

The chapters that follow contain the substance of lectures delivered at Cambridge University and at the London School of Economics and Political Science during the summer of 1921. They are concerned with a subject of which no American citizen can afford to be ignorant, and some kind friends have persuaded me that their publication might serve a useful purpose. My object has been neither to idealize nor to depreciate the work of the Fathers but to describe it, in its historical setting, as a human achievement which has not grown less significant with the passing of the years.

A great amount of bibliographical information on the subjects dealt with and on many others that have to do with the formation of the Constitution can readily be found in Channing, Hart and Turner *Guide to the Study and Reading of American History,* Part IV, chapter xix, and Part V, chapters xxi-xxii, and in the critical essays on authorities appended to the volumes of *The American Nation* (edited by A. B. Hart) by C. H. Van Tyne, A. C. McLaughlin and J. S. Bassett. It has seemed unnecessary, therefore, to include a bibliography in this volume.

I am indebted to the editors of the *Political Science Quarterly* for permission to reprint in the third chapter parts of an article entitled "Agreement in the Federal Convention," which I contributed to the June, 1916, number of that journal.

R. L. S.

Inlet, New York.
August, 1923.

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CHAPTER I

AMERICAN EXPERIMENTS IN FEDERALISM

It goes without saying that a constitution is of interest primarily and peculiarly to the people who live under it; many are of little interest to anybody else. But there are two constitutions that have exerted such far-reaching influence as to appear almost ecumenic in character. As a result of English colonization and conquest, and of more or less conscious imitation by alien peoples, English legal ideas and political institutions have been spread throughout the world. The distinguishing characteristics of the English Constitution—the supremacy of law over the government, the representative system, individual liberty—have become part of the world's political heritage. It was reserved for the United States to give the first example of federal government on a large scale, and wherever federalism has been established during the last hundred years there has been indebtedness to the American experiment. My principal pur-

pose in this volume is to present a view of the American Constitution in its historical setting, to try to show what it meant to the men who made it. But let us not forget that what was done by them in the effort to solve their own immediate problems has turned out to be an event in world history.

Before American experience had demonstrated the contrary, it used to be generally supposed that federal government was suitable only for small countries. It is not strange that this supposition was entertained at a time when federalism was confined to Switzerland and the Netherlands, and when the great powers were centralized monarchies. In his work on federal government, written some sixty years ago, Freeman gave as the four principal examples of federalism, the Achaian League, the Swiss Confederation, the Netherlands and the United States. Of these only the last was drawn on a large scale, and what the author thought of its chances of survival is indicated by the title of his book: *History of Federal Government from the Foundation of the Achaian League to the Disruption of the United States.* It is only fair to add that the first volume of this learned work appeared shortly after the Battle of Fredericksburg; the second volume was never published.

The years since Freeman wrote have witnessed a remarkable spread of the federal idea. In the British Empire, Canada and Australia have adopted the federal system of government; for many years Imperial Federation was advocated with great

energy as the only practicable means of preserving the unity of the Empire, while a federation of the British Isles was favored by some who saw in it a solution of the vexatious Irish question; and federation of some sort has been urged as the only suitable form of government for India. The constitution of the German Empire conformed to the federal type, and the governments of the present German Republic and of Soviet Russia are quasi-federal in character. Conditions in China seem to mark that country as a promising field for future experiments in federalism; and others than poets have dreamed of a federation of the world. Logically, federalism does not involve democracy—the history of Imperial Germany shows this—but it may be said that democracy on a very large scale involves federalism. In some form or other federal government appears to be the only democratic system for peoples inhabiting wide stretches of territory, with widely diverse local interests and needs. It is not strange, therefore, that with the growth of democracy the point of view regarding federalism has changed, that what was once thought fit only for a Switzerland came to be seriously proposed for the British Empire.

I am not ambitious of adding another to the list of definitions of federal government, but it seems to me important, in view of the great possibilities of federalism—and no one can think that it has borne its full fruit—to remark that those who have defined it have had in mind a process of unification.

This is natural enough, since the outstanding federations have been established through such a process; the parts have preceded the whole. The direction of change has been from state sovereignty, to borrow the American terminology, toward nationalism. So Professor Dicey, in his well-known discussion of federalism, tells us that one of the conditions requisite for the establishment of a federal state is that there "must exist . . . a body of countries, such as the Cantons of Switzerland, the Colonies of America, or the Provinces of Canada, so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality." That is to say there must be separate states before there can be a federation. But the establishment of a federal system may take the form of decentralization as well as of unification. Federalism may be invoked as a remedy for the evils of undue centralization as well as for the disadvantages and dangers of particularism and disunity. The case of Mexico may be cited, though one does not turn to that country for a striking example of the smooth working of federal government, or of any government, for that matter. In Mexico, federalism came through a process of decentralization; the whole preceded the parts. The same is true of Argentina and Venezuela, much more successful examples of federal government. Federalism as a means of decentralization is emphasized not because of any conspicuous successes that it has

so far achieved, but because of its great possibilities. It may be the only means of introducing democracy in large countries where it does not already exist, as in India; and in those where it does exist, at least in name, federalism may be the best means of vitalizing democracy and freeing it from the deadening blight of centralized bureaucracy. A political philosophy that makes the attainment of nationality the supreme object of political endeavor naturally prefers the unitary to the federal type of government, but one that places the major emphasis upon democracy may well hold a different view.

Gladstone's famous aphorism regarding the Constitution of the United States—"the most wonderful work ever struck off at a given time by the brain and purpose of man"—is responsible for a good deal of historical misapprehension. It has created or fostered the notion that the Constitution was a brand new political instrument, an invention of the men who drafted it. But in fact the American written Constitution, like the English unwritten Constitution, was a product of human experience, not of abstract reason; and it is impossible to understand why it was adopted without knowing something about earlier projects of federal government in America and a good deal about conditions in the United States—economic, social and political—on the eve of its adoption. Whether or not the period from the close of the War of Inde-

pendence to the ratification of the Constitution was in reality such a crisis in the life of the American people as has generally been supposed, it was undeniably a period of transition, during which Americans, having emancipated themselves from external control, were feeling their way toward an efficient form of national government. It was their experience in these years and under a weak federal government that explains the movement for change which culminated in the formation of the present American Constitution.

The Constitution is not to be regarded as in any true sense an original, creative act of the convention at Philadelphia, which framed it. The convention merely brought to a focus, as it were, the leading proposals for reform that had been made and, with great political sagacity, many compromises and the retention of what had been proved to be most valuable in the old system, fused them into a written instrument of government. The truth about the making of the Constitution was stated by Madison in a private letter written long after the event.

"The change in our government," he said, "like most other important improvements, ought to be ascribed rather to a series of causes than to any particular and sudden one, and to the participation of many, rather than to the efforts of a single agent. It is certain that the general idea of revising and enlarging the scope of the federal authority, so as to answer the necessary purposes of the Union, grew

up in many minds, and by natural degrees, during the experienced inefficacy of the old confederation."

Historians who have dealt with revolutions have generally emphasized their radical at the expense of their conservative aspects; they have dwelt upon the innovations that revolutions have wrought, rather than upon the continuity which they have left unbroken. They have not sufficiently acquired that sense of the unity of history which should make the historian feel, in the words of Maitland, that "his first sentence tears a seamless web." Most of the historians of the United States have been inclined to separate too sharply the colonial period of our history from the national period, to think of them as separated sharply by the Revolution. It is only within recent years that the importance of colonial history, as the background of the later national history, has come to be adequately appreciated. Like much else in American history federalism does not begin with independence; it carries us back far beyond the Revolution, almost to the beginning of English colonization in America; and by way of introduction to our subject it will be proper to refer briefly to some of the plans and projects for federal union among the American colonies.

The earliest of these was the famous New England Confederacy of 1643. The four colonies which entered this union, Massachusetts, Plymouth, Connecticut and New Haven, were possessed of a sim-

ilar political organization and ecclesiastical policy, they were remote from the other English colonies of Virginia and Maryland to the south, from which they differed both in politics and religion, they were confronted with the possibility of attack from the Dutch on the Hudson and the French to the north, while the presence of warlike tribes of Indians in their midst constituted a standing menace to their security. All these conditions made cooperation desirable, and in 1643 articles of union were drawn up by commissioners from the four colonies. The province of Maine was excluded, Governor Winthrop tells us, because its inhabitants "ran a different course from us both in their ministry and civil administration," while Rhode Island, founded by religious and political radicals banished from the other Puritan colonies, was regarded as the black sheep of New England and was not desired as a partner. The union was declared to be "a firm and perpetual league of friendship and amity, for offence and defence, mutual advice and succor upon all just occasions, both for preserving and propagating the truths of the Gospel," and for "mutual safety and welfare." The only organ of federal government provided for was a board of eight commissioners, two to be chosen annually by the legislature of each of the several colonies. Thus, irrespective of their population or wealth, the colonies enjoyed equal representation on the board, but common expenses were to be borne by them in proportion to the number of male inhabitants be-

tween the ages of sixteen and sixty years, the actual levy and collection of taxes being left to the individual colonies themselves. In raising troops it was provided that Massachusetts should furnish 100 and each of the other colonies 45. An affirmative vote of six commissioners was required for the passage of all federal measures, and the powers conferred on the commissioners were few and strictly limited. The right of interpreting the articles rested ultimately with the colonial legislatures, which were therefore, in fact, able to nullify measures passed by the board. For a time, however, the confederacy did good service, especially in dealing with the Dutch, the French and the Indians. It was weakened by the union of New Haven and Connecticut in 1664, and it disappeared forever as a result of the loss of the Massachusetts charter twenty years later.

The plans for colonial federation that were put forth during the next seventy-five years were inspired by the great struggle in North America between France and Great Britain. The danger to the British colonies from the French in Canada and the west naturally suggested joint military action, and other conditions contributed to make some sort of federation seem desirable to many persons in the colonies and in England. In 1698 William Penn proposed that each colony should appoint two delegates to form a congress—this seems to be the first time that this word was used to designate an intercolonial assembly—and that a

high commissioner, appointed by the crown, should preside over it and command the colonial forces in time of war. The congress was to promote harmony between the colonies, safeguard commerce and take measures for the general tranquillity. Penn's proposal is the first that included in its scope all of the continental colonies, and it is probably the earliest project for a federation of colonies within the British Empire with an executive appointed by the crown; in this respect it foreshadows, remotely, the great British Dominions of to-day. In 1701 Robert Livingston of New York, in a letter to the Board of Trade, recommended the establishment of a uniform system of government for all the colonies and their formation into three sectional confederacies, a southern, a middle and an eastern. In 1721 the Earl of Stair proposed a plan of federal union, similar in character to Penn's, but to include the British West Indies as well as the continental colonies.

The British government finally became convinced that separate action on the part of the colonies in providing for their defence and treating with the Indians resulted inevitably in inefficiency and injustice; and in 1753, on the eve of the last intercolonial war, the Board of Trade instructed the colonial governors to recommend to their assemblies the appointment of commissioners to attend an intercolonial congress for the purpose of making a treaty with the Six Nations and also of considering a plan for union among the colonies. A con-

gress composed of delegates from seven colonies met at Albany in June, 1754, and after much debate adopted a plan of union, of which Franklin, one of the Pennsylvania delegates, was the principal author. The proposal was to apply for an act of parliament to establish a general government for the colonies, under which each colony was to retain its existing system of government except where changes might be directed by the act. The general government was to be administered by a president-general, appointed by the crown, and a grand council, composed of representatives chosen by the colonial assemblies in numbers proportional to the contributions of the several colonies to the general treasury, no colony to have more than seven or less than two representatives. Among the powers conferred on the president-general and grand council—the federal government—were the regulation of Indian relations, the founding and government of new settlements on lands purchased from the Indians, the raising of troops and the equipment of vessels of war. A very significant provision was that which gave the federal government itself the authority to lay duties and taxes. The Albany Plan indicates a long step forward in the conception of federal union. It gave the central authority executive as well as legislative power, and enabled it, especially in the important matter of taxation, to act directly on individuals. It was satisfactory, however, neither to the British government nor to the colonial assemblies, and it was therefore re-

jected, so that the last and, as it proved, the decisive conflict between the British and the French in North America was waged without any political union among the British colonies, a fact to which the long duration of the war and the ill-success of the British during its early years are in no slight degree attributable. Long afterwards Franklin said that the adoption of the Albany Plan would have prevented the American Revolution. He may perhaps be justly suspected of exaggerating the importance of his own handiwork, but if the plan had gone into operation and a federal colonial army had come into existence, the British government might never have deemed it necessary to maintain in the colonies that standing army for the support of which the Stamp Act was passed.

With the British conquest of Canada and the collapse of French power in North America the spirit of co-operation in the colonies would no doubt have waned had it not been for the new colonial policy of the British government, of which parliamentary taxation of the colonies was the outstanding feature. Great Britain had desired the colonies to act collectively against the French; they now insisted on speaking collectively to her. That was the meaning of the Stamp Act Congress of 1765 and the First Continental Congress of 1774. The Second Continental Congress got beyond speech.

Some of the most original and constructive thought on the problem of British imperial reconstruction during the critical years preceding the

appeal to arms came from the American Loyalists. These men were not debased minions of tyranny and enemies of the human race, as pictured by their foes, the revolutionists, nor were they a party of mere negation and obstruction. They believed that the course which had been taken by the British government was wrong, and most of them recognized that the colonies had valid grievances; but they saw the problem as one of imperial reorganization, and they desired reform without revolution. Suppressed by the revolutionists as treasonable, their writings were consigned to an oblivion from which they were not rescued for a hundred years.

None of the Loyalists saw the issue more clearly than did Joseph Galloway of Pennsylvania. In the First Continental Congress, which reflected both the radical and the conservative elements into which the people of the colonies were then divided, he presented a plan for a union between Great Britain and America, which, like the Albany Plan, provided for a federation of the thirteen colonies. A president-general, appointed by the crown, and a grand council, to be chosen by the several colonial assemblies, were to "exercise all the legislative rights, powers, and authorities necessary for regulating and administering all the general police and affairs of the Colonies, in which Great Britain and the Colonies, or any of them, the Colonies in general, or more than one Colony, are in any manner concerned, as well civil and criminal as commer-

cial." The president and grand council—and here Galloway went beyond the Albany Plan—were to form "an inferior and distinct branch of the British Legislature, united and incorporated with it for the aforesaid general purposes." Measures affecting both Great Britain and the colonies might originate either in the British parliament or in the grand council, but the assent of both was to the requisite to their validity. The strength of the conservatives in the First Continental Congress is shown by the fact that this plan of Galloway's, which came close to a proposal for imperial federation, secured the vote of five colonies against six; the plan and all references to it, however, were later expunged from the minutes of the congress. In a pamphlet written shortly afterwards, in which he defended his scheme as offering the best practicable solution of the British imperial problem, Galloway said that under it "no law can be binding on America, to which her people, by their Representatives, have not previously given their consent." "Had it been adopted," says Moses Coit Tyler in his *Literary History of the American Revolution,* "the disruption of the British empire by an American schism would certainly have been averted for that epoch, and, as an act of violence and of hereditary unkindness, would perhaps have been averted forever."

In the Second Continental Congress Franklin presented as a plan of union a sketch of articles of confederation. This was in July, 1775, after Lex-

ington and Bunker Hill had made reconciliation doubly difficult, after the congress had adopted a declaration setting forth the causes and the necessity of taking up arms. Franklin's plan provided for the establishment of a confederacy to be styled "The United Colonies of North America," the several colonies to be united in "a firm league of friendship." Expenses incurred for the common welfare were to be defrayed out of a common treasury, supplied by the colonies in proportion to their male population between 16 and 60 years of age, and the representation of the colonies in the federal congress was to be in the same proportion. This plan naturally differed in important respects from those previously proposed; its revolutionary character, reflecting the progress of events in the dispute with the mother country, is seen in the provisions empowering the congress to make war and peace, send and receive ambassadors and enter into alliances, and in the substitution of an executive council appointed by congress for an executive appointed by the crown, as had been proposed in the Albany Plan and the Galloway Plan.

No account of the making of our federal Constitution can leave out of consideration the revolutionary state constitutions. The idea of a written constitution, based upon an agreement of the people, was not new; it had played an important part in the political philosophy of the Puritan Revolution in England. But it was in America that the

idea first struck deep root. The American state constitutions, adopted while the Revolution was in progress, are not only the earliest of modern written constitutions, and as such of importance in the history of politics; they are vitally related to the subject in hand, for the men who framed the federal Constitution had been living under these state constitutions, and in their work of draftsmanship they drew heavily upon them.

American history has been so generally written and studied from the national point of view that we tend, as Lord Bryce remarked in his *American Commonwealth,* to lose sight of the states. There was an American Revolution, but there were also thirteen colonial revolts. A month before the Continental Congress declared the United States independent, Virginia formally declared herself a free, sovereign and independent state. The great conflict in the United States between state sovereignty and nationalism was to be decided in favor of nationalism—not by constitutional dialectics but on the battlefields of the Civil War. Yet it would be a grave mistake to read modern American nationalism back to 1776. This is not the place to consider at length the question of the precise location of sovereignty during the American Revolution. That is a theme upon which much ingenuity of argument has been expended, and we may safely leave it to the constitutional jurists and the political philosophers. But, to guard against anachronism, it is worth while to quote from an opinion of

Mr. Justice Chase in the case of Ware *v.* Hylton, decided by the supreme court of the United States in 1796. Speaking of the Declaration of Independence, of which he was a signer, the learned Justice said:

"I consider this as a declaration, not that the United States *jointly,* in a *collective* capacity, were independent states, &c. but that *each* of them was a sovereign and independent state, that is, that *each* of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth."

Much of great significance during the Revolution fell within the sphere of state action. Before congress formally declared independence the colonial establishments had been swept away by the rising tide of revolution, except in Connecticut and Rhode Island, where the old charter governments, which had always been republican in character, were retained when those colonies became independent states. Elsewhere the royal and proprietary governors and officials fled or fell into the hands of the revolutionists, and the old legislatures and courts came to an end. For a time men lived in that condition which those who knew their Locke called "a state of nature," though the inconvenience of such a situation was materially mitigated by the fact that local government, in town and county, went on without any breach in continuity. Revolutionary congresses, conventions and committees

came into existence, and in May, 1776, congress recommended the establishment of new state governments. This work was begun even before the Declaration of Independence, and by the close of 1777 all of the states except Massachusetts had adopted constitutions. These were framed and put into effect by revolutionary congresses or by specially summoned constitutional conventions. In the case of Massachusetts a more democratic course was followed; there the constitution, framed by a convention, was submitted to the electorate in the towns and accepted in 1780 by what would to-day be called a referendum.

In every case the state constitutions professed to be based upon consent and declared that supreme political power resided in the people, though the franchise in all the states fell short of universal male suffrage. The doctrine of popular sovereignty and the fact of restricted suffrage seemed no more inconsistent to the Americans of 1776 than they had to John Locke. The prevalent fear and suspicion of government, nurtured by the conflict with Great Britain and by the political philosophy to which the revolutionists appealed, was reflected in the bills of rights, safeguarding individual liberty against legislative as well as executive encroachment, which it was thought necessary to incorporate in some of the constitutions; in the separation of the departments of government; in checks and balances; and in annual elections. Lord Bryce somewhere observed that Englishmen have deemed

liberty sufficiently secure when they have set limits to executive power, while Americans have insisted upon restraining legislative power as well. The historical explanation of the difference is that in England the crown used to be the great menace to liberty, while the American Revolution was a protest against a parliament as well as against a king. A sovereign legislature, sovereign in the absolute sense of the word, was as repugnant to the political ideals of the revolutionists as a sovereign executive. John Locke came into his own more truly in revolutionary America than he ever has in his own land.

The state constitutions all recognized the threefold division of the powers of government, which Montesquieu had made current in political discussion, and provided for their exercise by separate departments. The most precise formulation of the doctrine of the separation of powers occurs in the Massachusetts Declaration of Rights of 1780:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

All but two of the constitutions provided for bicameral legislatures. While the legislature was not trusted too far, the executive was an object of

still greater suspicion, for Americans in 1776, when they thought of executive power, inevitably remembered George III and the royal colonial governors. Most of the constitutions provided for the election of the governor by the legislature and withheld from him the veto power. In the Federal Convention Madison commented on the tendency to throw all power into what he called the "legislative vortex," and declared that the state executives were little more than cyphers.

At a time when many forces tended to hold the people of the different states apart and retard the formation of an organic union, the importance of the general similarity of these state constitutions can scarcely be exaggerated. All the way from New Hampshire to Georgia men were living under the same kind of political institutions, acquiring the same kind of political experience. Their attitude toward government and liberty and human rights was everywhere fundamentally the same; however diverse their local interests, however great their jealousies and antagonisms, they shared the same political tradition and outlook.

The need for concerted action against Great Britain kept the United States in some degree of cohesion during the progress of the war, but it was not until near the close of hostilities, in March, 1781, that the first federal constitution, the Articles of Confederation, went into operation. The Continental Congress, which exercised general super-

intendence over the conduct of the war, was a revolutionary body, acting without legal authority or legal restraint. It assumed some powers necessary for the general direction of the affairs of the United States as a whole; for example, it created a continental army, declared independence, issued paper money, borrowed on the credit of the United States, and negotiated with foreign governments. Its great defect, considered as a revolutionary government, was its lack of executive power and its dependence on the states to give effect to its recommendations and decisions. "Congress," it has truthfully been said, "did, not what was needed to be done, but what it was able to or thought it wise to attempt, at times showing energy and intelligence, again sinking into sloth and incompetence."

But even before independence had been declared the need was felt for a federal government based on a written constitution. On June 7, 1776, congress decided that a plan of confederation should be prepared and transmitted to the several states for their acceptance, and a few days later a committee, consisting of one member from each state, was appointed to prepare such a plan. On July 12, 1776, a week and a day after the Declaration of Independence had been proclaimed, the committee reported the first draft of the Articles of Confederation. Congress, however, was busy with the problems of war, and the debates on the Articles dragged over a period of more than a year. The instrument was not finally agreed to by Congress

until November 15, 1777, when it was sent to the states with the understanding that unanimous approval by their legislatures was necessary for its adoption. With it went a circular letter of congress urging ratification.

"Hardly is it to be expected," ran this document, "that any plan, in the variety of provisions essential to our union, should exactly correspond with the maxims and political views of every particular state. Let it be remembered, that, after the most careful enquiry and the fullest information, this is proposed as the best which could be adapted to the circumstances of all; and as that alone which affords any tolerable prospect of a general ratification."

Most of the states approved the Articles within a year, but Maryland, for reasons that will be explained in the next chapter, did not ratify until March 1, 1781.

The form of union established by the Articles of Confederation was "a firm league of friendship" between the states, each of which retained its sovereignty and all powers not expressly delegated to the United States. For carrying on the federal government a single organ was provided, a congress composed of delegates appointed annually by the states, in such manner as their legislatures might direct, and paid by them. Irrespective of population or wealth the states enjoyed equal representation in congress, each having one vote and

each being represented by at least two and not more than seven delegates. Federal expenses were to be defrayed out of a common treasury supplied by the states, upon the requisition of congress, in proportion to the value of the land granted or surveyed in each state and the improvements thereon. The federal army was to be supplied by the states, upon the requisition of congress, in proportion to their numbers of white inhabitants. Among the powers conferred on congress were: to determine on war and peace, send and receive ambassadors, make treaties, regulate the value of coin both of the United States and of the several states, establish post offices, borrow money and emit bills of credit, build a navy, determine the sums of money and numbers of land forces to be raised by the states, appoint a "committee of the states" to sit during the recess of congress, and such other committees and officers as might be necessary. Two very important powers were not conferred on congress: the power to levy taxes and the power to regulate commerce. Certain limitations were placed upon the states, notably in the sphere of foreign relations. Without the consent of the United States no state might enter into diplomatic relations with any foreign power, nor into a treaty or alliance with any other state in the union, nor impose duties conflicting with stipulations in treaties made by congress, nor maintain an army or navy in time of peace, nor engage in war unless invaded, nor license privateers. For the determination of all important ques-

tions within the competence of the federal government the assent of nine states in congress was required. No amendment to the Articles could be made unless first agreed to by congress and afterward ratified by the legislature of every state. The states were to "abide by the determinations of Congress" on all questions which by the Articles were submitted to that body, and there was a stipulation that the Articles should be "inviolably observed by every state." Perhaps the most valuable provision was that which guaranteed inter-citizenship: "the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states." Under this guarantee a citizen of New York, for example, could emigrate to New Jersey and claim all the privileges of citizenship in that state. Interstate extradition of criminals, too, was provided for, and it was stipulated that full faith and credit should be given in each state to the records, acts and judicial proceedings of the courts and magistrates of every other state.

Experience was soon to point out many particulars in which the Articles of Confederation were defective, but it may be said here in anticipation that the fundamental weakness was state sovereignty. It is no doubt true that after ratifying the Articles, the states were in honor bound to abide by the determinations of congress in matters that fell within the scope of federal action and to ob-

serve the limitations placed upon their own power. In actual practice, however, they left undone those things which they ought to have done and they did those things which they ought not to have done; and all that congress could do was to protest. The Articles of Confederation lacked legal sanction, and events were to show that state honor was a very insufficient guaranty for the observance of constitutional obligations.

It is customary for the student of American history, comparing the troubled course of events under the Articles of Confederation with the progress of the nation under the present Constitution, to pronounce this first federal experiment extremely crude and defective. It was, of course, not so regarded by those who framed and adopted it. Jefferson may have been indulging in that intemperateness of language into which enthusiasm or repulsion sometimes carried him when he wrote that a comparison of the American government with those of Europe "is like a comparison of heaven and hell. England like the earth, may be allowed to take the intermediate station." But soberer expressions of approval by other contemporaries could be quoted, and of late writers have not been wanting to say a good word for the Articles. One American historian tells us that they "were in many respects models of what articles of confederation ought to be, an advance on previous instruments of like kind in the world's history." It should, at any rate, be remembered that those

who framed the Articles of Confederation had few precedents in federal government to guide them. They were doing pioneer work, for none of the great federations of the present had yet come into existence. Conditions in the United States, as soon became apparent, did not call for pure federalism, as that term was understood at the time, but rather for a system that should combine federalism and nationalism; but it would have been remarkable indeed if a constitution brought forth in the shock of war had proved satisfactory as a permanent form of political organization. The nature of the Revolution itself, the political philosophy which accompanied it and the conditions prevailing in the country during its progress—all were unfavorable to the formation of a stable and efficient central government.

The Revolution was a struggle for local self-government against the external and centralized control asserted by the British government. Liberty was associated with that localism which physical conditions created in all lands before the advent of steam and electricity. Men were still living in the days of the stage coach and the sailing vessel. They could travel no faster than horses or wind could take them; and news could travel no faster than men. Bad roads and lack of bridges made travel and communication far more difficult in America than they were in Europe. It required at least four days to journey from Boston to New York. To the New Englander South Carolina and

Georgia were far-off lands. Under such conditions men's interests naturally centered in their own localities, and the patriotism of many a sturdy Revolutionist was bounded by the limits of his own state. Why should those who had taken up arms against the claim of parliament to tax them, and who had grumbled at the laws it passed for the regulation of their trade, promptly concede these very powers to another central and remote government? This reasoning may not have been wholly logical, but it is not difficult to understand.

The political philosophy which the American Revolutionists invoked to justify separation from England strengthened the spirit of localism. In the early days of the dispute between the colonies and the mother country the colonists laid great stress upon what they called the "British Constitution" and their "constitutional" rights as Englishmen; and as the controversy progressed much was made of the early colonial charters to show that from the outset the colonies had been regarded as beyond the realm and the authority of parliament and subject only to the crown. But appeals to the doctrine of a fundamental law above parliament and to charters, while useful in denying parliamentary authority over the colonies, did not justify severance of the bonds which, by the admission of the colonists themselves, united them to the British crown. To justify complete independence —independence of the king as well as of parliament—resort was had to the natural-rights phi-

losophy of Locke, with its defence of revolution. In formulating his individualistic theory of the origin and purpose of government, by which he gave ideological justification to the English Revolution of 1689, the Whig philosopher forged a weapon which the American Revolutionists were to use nearly a century later with tremendous effect. The generalizations of the Declaration of Independence are little more than a re-statement of the principles set forth in the second of Locke's *Two Treatises of Government.* The emphasis which the Revolution put upon natural rights inculcated distrust and fear of government in general. Political authority was at best a necessary evil, at worst a hideous tyranny. Such a pamphlet as Tom Paine's *Common Sense,* the most popular and influential publication of the day, was not calculated to instill respect for the powers that be. Since, however, government could not be dispensed with, it must be jealously watched and carefully curbed. Even governments based on popular consent were tainted, it seemed, with the original sin of divine-right monarchy and were prone to tyrannize. The spirit which insisted on safeguarding individual liberty by incorporating elaborate bills of rights in the state constitutions would surely refuse to concede extensive powers to a central government far remote and, therefore, all the more difficult to watch and restrain.

Furthermore, the social and economic disorganization caused by the Revolution contributed

greatly to the difficulty of establishing an efficient government. For the Revolution was a civil war. It was not a spontaneous uprising in behalf of human rights of a whole people in revolt against tyranny. In its inception it was the work of an aggressive minority, strong in leadership, agitation and organization, carrying with them a larger mass of their less active fellow-citizens. A large minority of the colonists, probably at least one-third, comprising many of the more intelligent and substantial people, and including many of the old leaders in society and politics, disapproved of the Revolution, were stigmatized as Tories and suffered loss of property and all manner of indignity at the hands of their exasperated and often envious neighbors, the Revolutionists. No account of the Revolution that does not show that it involved social upheaval and redistribution of property is true to the facts. Many of the American Loyalists were banished or fled from the country—some to England, some to the West Indies, some to Nova Scotia, some to lay the foundations of two new British provinces, Ontario and New Brunswick. A people passing through such disorganization and civil commotion was ill-qualified to establish an enduring political system. In the nature of the case some time would have to elapse and much experience would have to be gained before this could be done.

From the beginning there were men who were dissatisfied with the Articles of Confederation.

Though our records of the debates on the Articles in the Continental Congress are most fragmentary, we are not left wholly in the dark as to the nature of the discussion. The method of voting in congress seems to have provoked most controversy, and the great dispute between the large and the small states over representation, which later threatened to wreck the Federal Convention, is clearly foreshadowed in the debates of 1776. We are told that the larger states threatened that "they would not confederate at all if their weight in Congress should not be equal to the numbers of people they added to the confederacy; while the smaller ones declared against a union if they did not retain an equal vote for their rights. . . ." Franklin, representing the large state of Pennsylvania, bluntly and prophetically observed:

"Let the smaller Colonies give equal money and men, and then have an equal vote. But if they have an equal vote without bearing equal burdens, a confederation upon such iniquitous principles will never last long."

Dr. Rush, also of Pennsylvania, made an eloquent plea for nationalism as opposed to state sovereignty:

"We are now a new nation. . . . The more a man aims at serving America, the more he serves his colony. . . . We have been too free with the word independence; we are dependent on each other, not

totally independent states. . . . When I entered that door I considered myself a citizen of America."

On the other hand, Roger Sherman of Connecticut, voicing the sentiments of the small states, declared:

"We are representatives of states, not individuals; three colonies would govern the whole [if representation were based on population] but would not have a majority of strength to carry these votes into execution."

Thus it appears that the conflict between federalism and nationalism was no new phenomenon when the Federal Convention met in 1787. In the making of the Articles of Confederation federalism triumphed, but experience under that instrument led to a rapid growth of nationalism.

For some years before the Articles of Confederation went into operation in 1781, they had been before the states for ratification, their contents were well known, and congress, as far as possible, had acted in accordance with their provisions. This explains the seeming paradox that criticism of the Articles preceded their adoption. In a remarkable letter written in September, 1780, to James Duane of New York, Alexander Hamilton, then only twenty-three years old, set forth the defects of the confederation, and attributed them ultimately to state sovereignty.

"The idea of an uncontrollable sovereignty, in each State . . . ," he wrote, "will defeat the other powers given to Congress, and make our Union feeble and precarious. . . . Congress should have complete sovereignty in all that relates to war, peace, trade, finance."

From this time forward he labored with pen and speech to promote national sentiment in favor of a stronger union.

In March, 1781, just after the Articles of Confederation had gone into operation, Madison reported from a committee of congress an amendment authorizing congress

"to employ the military and naval forces of the United States to compel states, which refused or neglected to abide by the determinations of Congress and to observe all the Articles of Confederation, to fulfill their federal obligations."

This particular method of enforcing the federal pact was no doubt crude and could scarcely have formed part of the normal machinery of federal government, but in recognizing state sovereignty as the enemy Madison went to the root of the evil.

On account of his position General Washington was peculiarly aware of the defects of the confederation on the military side, and constantly lamented the inability of congress to call out adequately the military resources of the country. His correspondence is full of such passages as the following, written in October, 1780:

"We are without money and have been so for a great length of time; without provisions and forage, except what is taken by impress; without clothing, and shortly shall be (in a measure) without men. In a word, we have lived upon expedients till we can live no longer, and it may truly be said that the history of this war, is a history of false hopes and temporary devices, instead of system, and economy which results from it.

"If we mean to continue our struggles . . . we must do it upon an entire new plan. We must have a permanent force, not a force that is constantly fluctuating and sliding from under us as a pedestal of ice would do from a statue in a summer's day, involving us in expense that baffles all calculation. . . . We must at the same time contrive ways and means to aid our Taxes by Loans, and put our finances upon a more certain and stable footing than they are at present. Our civil government must likewise undergo a reform—ample powers must be lodged in Congress as the head of the Federal union, adequate to all the purposes of war. Unless these things are done, our efforts will be in vain, and only serve to accumulate expense, add to our perplexities, and dissatisfy the people without a prospect of obtaining the prize in view."

These words of the much-harassed and long-suffering commander-in-chief indicate the military weakness of congress. That body, however, proved no better able to grapple with the problems of peace than it had been to solve those of war. In the interest of British merchants to whom Americans

owed debts contracted before the war, Article IV of the treaty of peace with Great Britain, ratified by congress in January, 1784, provided that creditors should meet with no lawful impediment to the recovery of their debts, and Article V, in the interest of the Loyalists, pledged congress to "earnestly recommend" to the state legislatures to provide for the restitution of confiscated property and to revise their laws so as to render them "perfectly consistent, not only with justice and equity, but with that spirit of conciliation which on the return of the blessings of peace should universally prevail." Yet despite the treaty various obstacles to the collection of their debts were put in the way of British creditors by several of the states, and little attention was paid to the "earnest recommendations" of congress in behalf of the Loyalists. Mobs of patriotic Americans continued to mete out to the detested "Tories" treatment similar to that accorded them during the war, and it is unnecessary to say that this was not marked by that "spirit of conciliation" for which congress had piously hoped. Great Britain, on her side, refused to fulfill all of her treaty obligations, alleging in justification that the United States were guilty of prior infractions of the treaty. In particular, she retained the trading posts on the southern shores of the Great Lakes, and she failed to give compensation for property carried off by her armed forces at the close of the war. It is probably true that British violations of the treaty came first in point of time, and it is certain that

the British government was glad of a pretext for keeping possession of the Lake posts, which enabled British traders to control a rich fur trade and maintain British influence over the Indian tribes of the region. Thus the advent of nominal peace was far from restoring cordial relations between Great Britain and her erstwhile colonies.

CHAPTER II

THE CONFEDERATION

In nothing was the weakness of the Confederation more manifest than in finance. At the beginning of 1784 the federal debt, domestic and foreign, was not far from $40,000,000, a heavy burden for a people who did not exceed three and a half million in number, and this did not include the debts of the separate states. It had been contracted to carry on the war, and the Articles declared it to be a charge against the United States, for payment of which the public faith was solemnly pledged. To meet the federal obligations and provide for the running expenses of government congress had to rely on the requisition system or on further borrowing—a desperate expedient. Congress asked for $8,000,000 for 1782 and $2,000,000 for 1783, the first year of peace, but less than $1,500,000 of this $10,000,000 had been paid in by the states at the close of 1783. The total amount received by the federal treasury on requisitions from 1784 to 1789 has been estimated at less than $2,000,000. No wonder that the superintendent of finance, Robert Morris, was at his wits' end and declared that talking to the states was like preaching to the dead. The depth of financial degradation was reached

when congress, early in 1783, authorized the superintendent to draw on the credit of loans from foreign governments which American ministers had been instructed to negotiate, but which had not yet been secured!

Such a state of affairs was, of course, disastrous to American credit. Public securities rapidly depreciated and were bought up by speculators at a great discount, sometimes for less than one-tenth of their face value. The debt, too, was increasing through arrearages of interest. Bondholders, whether original purchasers or speculators, naturally desired to see a direct taxing power vested in the federal government as the only means of restoring public credit, and as early as February, 1781, congress proposed that the Articles should be amended so as to authorize the levy of a five per cent federal duty on imports, the proceeds to be used for paying the interest and principal of the debt. But the Articles, it will be remembered, could be amended only with the consent of every state, and the persistent refusal of Rhode Island to give its approval was sufficient to defeat this proposal. The financial outlook was gloomy indeed, for what happened to this amendment foretold the fate of others. Two years later congress made a further effort in the interest of public credit by asking for power to levy a small import duty for a period of twenty-five years for the purpose of paying the debt, and again the attempt failed, the recalcitrant state this time being New York. One

fact now emerges very clearly, that everyone interested in restoring the public credit, whether himself a public creditor or not, could be counted upon to support the movement to strengthen the federal government. A letter written by Hamilton to Washington about this time shows the connection between finance and politics and suggests an economic interpretation of state sovereignty and nationalism.

"There are two classes of Men, Sir, in Congress, of very different views: One attached to State, the other to Continental politics. The last have been strenuous advocates for funding the public debt upon solid securities; the former have given every opposition in their power."

There was one class of public creditors who were well organized and with whom it was particularly dangerous to trifle—the officers of the army. In 1780 congress, at Washington's urgent appeal, had promised half pay for life to officers who continued in service till the end of the war; but nothing more substantial than promises had hitherto been forthcoming, and after the close of hostilities it seemed likely that the army would be disbanded with the pledge unfulfilled. The officers in camp at Newburgh sent a committee to present a memorial to congress in behalf of themselves and the soldiers, whose pay was sadly in arrears.

"The citizens murmur at the greatness of their taxes," ran the memorial, "and no part reaches the

army. . . . The uneasiness of the soldiers for want of pay is great and dangerous; further experiments on their patience may have fatal effects. . . ."

A member of the officers' committee informed congress that the army was "verging to that state which, we are told, will make a wise man mad." It was in fact full of combustible material, and incendiaries to apply the torch were not wanting. Efforts on the part of the officers to secure justice having failed, matters reached a climax in March, 1783, when an anonymous address, now accepted as the composition of a certain Major Armstrong, aide-de-camp to General Gates, was circulated at Newburgh; its tone is illustrated by a single forceful sentence: "Appeal from the justice to the fears of government." It alluded to Washington as one to be suspected because he counselled forbearance. The commander-in-chief promptly disapproved a call for a meeting of the officers on the following day, which the address contained, and summoned one for a later date. At this meeting he cleverly cast discredit upon the incendiary address by suggesting that its author was a British emissary, urged the army to trust to the honesty of congress, and reprobated those who would incite to mutiny. Under the influence of his presence the officers unanimously adopted a resolution expressing abhorrence of the "infamous propositions" of the address, though many of them had undoubtedly been in complete sympathy with it. Not the least

of his services to the United States was performed by Washington on this occasion when he saved his country from the domination of a mutinous army. Even as it was, the country had a taste of mutiny when, in June, 1783, a handful of Pennsylvania troops demanded their pay from congress, and so terrorized that body that they fled from Philadelphia to take refuge under the sheltering wing of the college at Princeton.

The menace of the Newburgh address was not without its effect on congress, which hastened to commute half pay to officers for life to a sum equal to five years' full pay, in the form of interest-bearing certificates. Soon after this the army officers founded the Society of the Cincinnati, and the fact that the members of this order were public creditors helps to explain the suspicion with which it was widely viewed. The members of the Cincinnati were of course in favor of strengthening the federal government.

Contemporary correspondence makes it clear that some of those who deplored the financial weakness of the Confederation were not wholly displeased with the mutinous spirit shown in the army. Gouverneur Morris wrote to General Greene:

"The main army will not easily forego their expectations. Their murmurs, though not loud, are deep. If the army, in common with all other public creditors, insist on the grant of general, permanent funds for liquidating all the public debts, there can be little doubt that such revenues will be obtained,

and will afford to every order of public creditors a solid security."

And Hamilton wrote to Washington:

"It appears to be a prevailing opinion in the army, that the disposition to recompense their services, will cease with the necessity for them; and that, if they once lay down their arms, they part with the means of obtaining justice. . . . The claims of the army, urged with moderation, but with firmness, may operate on those weak minds which are influenced by their apprehensions more than by their judgments, so as to produce a concurrence in the measures which the exigencies of affairs demand."

Hamilton, however, realized the danger in the situation, for he added: "But the difficulty will be, to keep a *complaining* and *suffering army* within the bounds of moderation."

Under the Articles of Confederation it fared nearly as badly with commerce as with finance. Congress had no power to regulate foreign or interstate trade. Each state had its own tariff system and taxed imports and exports to suit itself. Experience was not long in revealing the disastrous effects of this condition of affairs.

American commerce had, of course, been thoroughly disorganized by the war. The merchant marine had been nearly destroyed, and the fisheries, "the mines of New England," as they were called, were in like plight. Nautical enterprise, it is true,

had found some scope in privateering, and Boston alone is said to have commissioned more than 350 privateers during the war; but these profitable adventures were terminated with the advent of peace. An immediate return to ante-bellum conditions was impossible. In the colonial period American trade had been mainly with Great Britain and the other British colonies. But America was no longer a part of the British Empire; it was a rival nation against which British interests must be protected. William Pitt, it is true, introduced into parliament soon after the close of the war a remarkably liberal bill for commercial intercourse with America, but it failed to pass, and American commerce and shipping were subjected to various restrictions. Regarded from the point of view of the mercantile colonial policy to which Great Britain still adhered, these were not as extreme as most American historians have represented, but nevertheless they struck a heavy blow at American trade. In particular all commerce between the United States and the British West Indies was restricted to British ships, a provision that made it impossible to revive the extensive and profitable trade which had been carried on before the Revolution between New England and the islands. There was little demand for American-built ships, and the important New England shipbuilding industry was paralyzed. To protect the British whale fishery the importation of American whale oil into Great Britain was forbidden; and contrary to the pro-

visions of the peace treaty the British retained the northwestern trading posts, thus depriving Americans of a large share of the profits of the fur trade. All things considered, it is not strange that American merchants complained that they were much worse off than before the war, when trade within the British Empire, at least, had been open to them.

There is no doubt that in imposing restrictions on American commerce the British government was counting on the political weakness of the United States and their inability to retaliate. Lord Sheffield, one of the leading British authorities on trade, expressed the prevailing opinion when he wrote: "It will not be an easy matter to bring the American states to act as a nation; they are not to be feared as such by us." If treaties were to be made with America, let them be made, he advised, with the separate states. Congress had no authority to use the weapon of commercial retaliation, and though several states did undertake to discriminate against British commerce, lack of uniformity rendered their efforts futile. Madison said that the states were every day giving proof "that separate regulations are more likely to set them by the ears, than to attain the common object." In April, 1784, congress asked for power to prohibit for a period of fifteen years trade in vessels belonging to citizens of a nation with which no commercial treaty had been made. A division of opinion among the states on sectional lines was at once apparent. According to Madison, "the Middle States favor the measure,

the Eastern are zealous for it, the Southern are divided." This commercial amendment, like the revenue amendments, failed of adoption. American merchants and all persons interested in the development of trade were becoming convinced that the United States could never secure better treatment from other nations until the power to regulate foreign commerce was conferred on the federal government. It was the hope of many that commercial distress would force the desired reform. "Do not ask the British to take off their foolish restrictions," wrote Gouverneur Morris to John Jay, "the present regulation does us more political good than commercial mischief."

If the impotence of the federal government in foreign commerce hampered trade and made the United States contemptible in the eyes of foreign nations, its lack of power to control interstate commerce led to results fully as distressing. Trade between the states was fettered by import, export and tonnage duties, and the states, lately joined together to achieve their independence, were now waging commercial war against each other. New York levied duties on farm produce coming across the Hudson from New Jersey, and in retaliation New Jersey taxed a lighthouse which New York had erected at Sandy Hook. Connecticut suffered from the commercial restrictions of New York, and a meeting of business men at New London agreed to suspend temporarily all trade with the offending state. The country over, merchants wanted to see

congress given control of interstate trade as the only relief from an intolerable situation.

In addition to commercial quarrels, the states were vexed with boundary disputes, legacies from colonial days which remained to keep alive local animosity. The upper valley of the Susquehanna, and indeed the whole northern part of the present state of Pennsylvania, had been claimed by Connecticut under its old seventeenth-century charter. The Articles of Confederation provided for the creation of special courts or commissions to determine such disputes as might arise between the states, and in 1782, a court, constituted in accordance with the constitutional requirement, decided the case in favor of Pennsylvania. Connecticut acquiesced in the decision, but in 1784 trouble arose in the previously disputed territory between Connecticut settlers and a force of Pennsylvania militia, and lives were lost on both sides. Actual war between Connecticut and Pennsylvania seemed for a time not impossible.

The territory of the present state of Vermont proved a bone of contention between the neighbouring states. Before the Revolution a dispute between New Hampshire and New York for the possession of the Green Mountain region had been decided by the British government in favor of New York, but the settlers in the territory, the "Green Mountain Boys," refused to be bound by this decision and in 1777 formed a constitution and set up a commonwealth of their own, the state of

Vermont, actually independent both of Great Britain and of the United States, though the territory lay within the boundaries of the United States as determined by the treaty of 1783. New York did not abandon its claim until 1790; New Hampshire found an opportunity to reassert its old pretensions; and Massachusetts, not to be outdone, laid claim to part of southern Vermont. In turn, Vermont set up claims to certain towns in New Hampshire and in New York. Interstate war was averted, but the Vermont question was not settled till after the adoption of the Constitution. Thus in America, even under a "league of friendship," state sovereignty threatened to yield, on a small scale, the harvest of rivalry and hostility that national sovereignty had produced in Europe. There was not much actual bloodshed, it is true, but the germs of interstate war were there. An analogy between the situation in the United States under the Confederation and that in the world to-day would not hold at all points; but there is sufficient resemblance between them to make it worth while for those who seek to curb national sovereignty in the interest of a better world order to study with some care the work of those who curbed state sovereignty in the interest of a more perfect union.

No circumstance was more alarming to the business interests of the country than the agitation for "cheap money" and other measures for the relief of debtors, which reached a climax in 1786. Paper money was an old and well-known device in Amer-

ica. In colonial days several of the colonies had resorted to it. The Revolution had been financed by congress largely by means of paper money, and the separate states had employed the same expedient. Probably under the circumstances no other would have been practicable. The continental paper currency had so depreciated that it ceased to circulate in 1781, but the presence of the British army, together with foreign loans, brought in a good deal of specie, and it has been said that there had probably never been so much gold and silver in circulation in the country as immediately after the withdrawal of the British troops. But the resumption of importation at the close of the war reduced the supply of specie and created a scarcity of money, which weighed heavily on debtors, who, of course, began to agitate for a return to paper money. In every state parties divided on this issue. The more cheap money was urged, the more good money went out of circulation, and the harder became the debtor's lot. In six states, Connecticut, Massachusetts, New Hampshire, Virginia, Delaware and Maryland, the advocates of paper money were defeated, but in the others the legislatures enacted measures for the relief of debtors.

In Rhode Island, where there had been much experimenting with fiat money during the Revolution, the farmers favored and the mercantile interest opposed the issue of paper. The paper money party carried the election in 1786, and the legislature provided for an issue of paper money and

passed a "forcing" act to compel the unwilling to accept it at its face value, on pain of a heavy fine. Shopkeepers closed their doors, business was at a standstill. A certain butcher named Weeden refused to accept paper money in payment for meat and was tried for breach of the law. He was ably defended by counsel, and the court, in the case of Trevett *v.* Weeden, held the forcing act void on the ground that it was in conflict with the constitution of Rhode Island. This is one of the early cases in the United States where a statute was declared unconstitutional by a court. The judges were execrated by the friends of paper money but applauded by men of property throughout the state.

Doubtless there were to be found among the advocates of paper in 1785 and 1786 some reckless and dishonest individuals, but to attribute dishonest motives to the bulk of them would be as unwarrantable as to question the personal integrity of the more than 5,000,000 voters who supported cheap money in 1896. The champions of "sound" money overlooked the unquestionable fact that the increasing scarcity of currency was inflicting serious injury on debtors. It is probably true that the recent war had relaxed business standards and, accompanied as it had been by numerous acts of confiscation, undermined to some extent respect for private property. A war waged for "liberty" was not unnaturally accompanied and followed by what conservative men of property regarded as a spirit of licence. Certainly the hindrances placed by state

legislatures in the way of the collection of debts due British merchants, though clothed under a specious garb of "patriotism," do not indicate a nice sense of the obligation of contract. It was the assaults made by radicals upon property and the rights of contract which, more than anything else, drew the conservative, property interests of the country together in self-defence and strengthened the movement for a change in the political system.

The history of American diplomacy under the Confederation confirms the impression of lack of unity and national weakness that one gets from the domestic history of the period. Treaties were made with Holland, Sweden and Prussia, but serious disputes with Great Britain and Spain, the two powers whose territories were contiguous to the United States, remained unsettled. In 1785 congress appointed John Adams as minister to Great Britain, though no British minister was accredited to the United States until after the adoption of the Constitution. Adams tried manfully to carry out his instructions and secure the evacuation of the northwestern posts and a treaty of commerce, but he had no good answer to make when the British ministers met his proposals with the remark that the United States on their side were not executing the provisions of the treaty of peace. His mission was a failure and he returned in 1788, convinced that England would never treat with the United States under the Confederation as with an equal.

With Spain there were equally serious disputes.

There were controversies over the boundary between the Spanish province of West Florida and the United States and over the question of the navigation of the Mississippi. The western settlements of Virginia and North Carolina, in what are now the states of Kentucky and Tennessee, were vitally interested in the free navigation of the Mississippi, which Spain refused to concede, but the commercial sections of the United States were much more interested in securing a treaty that would give them privileges of trade with the Spanish colonies. At length Jay, the American foreign secretary, and the Spanish minister to the United States were ready to agree upon a treaty, suspending for twenty-five years the American claim to the navigation of the Mississippi in return for commercial privileges to be granted by Spain. Feeling ran high against the proposed treaty in the west and the south, and the debates and votes in congress revealed an alarming sectionalism, which boded ill for the permanence of the Union. The commercial states of the north were all in favor of a commercial treaty and the suspension of the right of navigation; the agricultural states of the south, to which the southwestern communities belonged, were solidly and vigorously opposed. Jay's propositions received the assent of only seven states in congress, and the treaty accordingly failed. All controversies between Spain and the United States remained unsettled. Unfortunately the suspicion of the commercial north which was aroused by this

episode in the south and southwest was not easily or speedily allayed.

Rapidly as the federal government was declining in power and reputation during these years, it was then that it came into possession and control of a vast domain, which constituted the first great tangible asset of the nation, and adopted the territorial policy which was to guide the future course of American expansion to the Pacific Ocean. At the close of the Revolution all the territory within the boundaries of the United States, as far west as the Mississippi, was claimed by one or another of the individual states. Such claims were asserted by Massachusetts, Connecticut, New York, Virginia, North Carolina, South Carolina and Georgia. They were based upon colonial charters or upon treaties with the Indians. The other states naturally opposed the contentions of their more fortunate sisters, and sought to curb their pretensions. Even before the Revolution projects were advanced for limiting the western extension of the "claimant" colonies, for to a great many people it seemed preposterous and unfair that they should be guaranteed all territory granted to them by ancient charters which had been drawn up before there was any accurate knowledge of the geography of North America. But they continued to assert their claims, and these were urged by the American peace commissioners in 1782 as ground for the inclusion of the west, as far as the Mississippi, within the boundaries of the United States. Still the non-

claimant states had to be reckoned with. At the beginning of the Revolution Maryland came forward as the principal opponent of western claims, and in July, 1776, one of its delegates in the Continental Congress stated the Maryland doctrine in these words: "No colony has a right to go to the South Sea! they never had; they can't have. It would not be safe to the rest." In November of the same year the Maryland delegates urged that the western lands should be regarded as the common possession of the United States, and in October, 1777, a resolution was introduced in congress giving the United States power to fix the western boundaries of such states as claimed to the Mississippi and to lay out the lands beyond into separate states, as conditions might require. This proposal was defeated, Maryland alone voting in favor of it, and the claimant states were so powerful that they succeeded in getting a clause inserted in the final draft of the Articles of Confederation, providing that no state should be deprived of territory for the benefit of the United States. Maryland, however, set in motion the train of events which led to the creation of federal domain, for she refused to ratify the Articles of Confederation so long as her more powerful neighbor, Virginia, persisted in asserting extravagant claims to western territory.

In order to hasten the ratification by Maryland, congress in 1780 urged the "claimant" states to abandon their claims and announced that all lands which might be ceded to the United States would be

disposed of for the *common benefit* of the states, and eventually formed into *separate states*, to become members of the union on a footing of complete *equality* with the original states. In this declaration are stated or implied the basic principles of our territorial policy: the disposal of public lands for the common benefit, their temporary organization and regulation by congress, and their ultimate formation into new states equal in all respects with the original commonwealths. New York was the first state to indicate willingness to accede to the recommendation of congress, and in 1781, Maryland, convinced that Virginia was prepared to yield most of its claims, consented to ratify the Articles. By 1786 all the states with claims to territory north of the Ohio River had ceded them to the United States (except for a reservation made by Connecticut of some lands south of Lake Erie, known as the Connecticut Western Reserve), and congress was therefore in a position to organize this vast territory as a federal domain.

As early as 1784, shortly after Virginia had finally ceded all its claims north of the Ohio, Jefferson, then one of the Virginia delegates in congress, drafted an ordinance providing for the organization of western lands "ceded or to be ceded" to the United States, which applied to lands that might be ceded south as well as north of the Ohio. With some modifications, this ordinance was passed, though it never went into operation. In harmony with the policy already outlined by con-

gress, it provided for the eventual admission of the western territory as *equal* states of the Union. At this time the population of the country north of the Ohio was confined to Indian tribes and the inhabitants of a few French villages in the present states of Illinois and Indiana. But in 1786 the Ohio Company was organized by a group of New Englanders to speculate in western land, and the opportunity of making a sale to this company hastened the action of congress in giving effective organization to the new federal domain.

In July, 1787, the famous Northwest Ordinance was passed by a congress in which there were present only eighteen delegates, representing eight states. It provided for the temporary organization of the whole territory north of the Ohio into a single district administered by a governor, a secretary and three judges, all appointed by congress. When the adult male population reached 5,000, an assembly might be established, consisting of the governor, a legislative council and a house of representatives. Not less than three nor more than five states might be organized within the territory, and when the population of any state reached 60,000 it was to be admitted into the Union on an equality with the original states. The ordinance also contains a series of declarations in the nature of a compact between congress and the future inhabitants of the territory, guaranteeing freedom of worship, habeas corpus and trial by jury, security of liberty and property, the obligation of contract

and the encouragement of education. Of great importance for the future was the clause which provided that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." It has been well said of this document: "It crystallized the principles of colonial organization about which men had been disputing for a generation." The government provided for was set up, land was sold to speculating companies, and in 1788 a group of New Englanders founded Marietta, at the mouth of the Muskingum. The hostile Indian tribes of the northwest continued, however, to form an obstacle to the settlement of the territory, and for several years its growth was slow.

Meanwhile population was moving into the western territory south of the Ohio, claimed by Virginia and North Carolina, where communities had been founded in what is now Kentucky and eastern Tennessee. The settlement of the southwest was highly individualistic and, in the main, uncontrolled by government. The interests of the western communities were different from those of the seaboard, and it was certain that their separation from the older states would be a matter of time only. A good example of the self-reliance and love of independence of the southwestern frontiersmen is afforded by the case of the settlers of eastern Tennessee. In 1784 North Carolina ceded its western lands to the United States but provided that, pending ac-

ceptance by congress, it should retain jurisdiction over them. The frontiersmen, regarding the authority of North Carolina as terminated, set up a state government of their own, named their commonwealth "Franklin," and asked congress for admission into the union. The "state" of Franklin enjoyed but a brief existence, and in 1788 North Carolina was able to resume its control, but the separatist spirit of the frontier was too strong to be checked permanently. The people of Kentucky, too, were anxious to set up a state organization of their own, and within a few years after the adoption of the Constitution, Kentucky and Tennessee were both admitted as states into the union.

In pamphlets, in letters and in the press suggestions for political reform were frequently made, and the more important of these had their influence on public opinion. Only a few of them can be mentioned here. In a remarkable series of papers, called *The Continentalist,* which appeared in 1781 and 1782, Hamilton probed the defects of the Articles of Confederation to their roots and urged that the powers of taxation, commercial regulation and disposal of ungranted land be given to the federal government. In February, 1783, there was published in Philadelphia *A Dissertation on the Political Union and Constitution of the Thirteen United States of North America* by Pelatiah Webster, a graduate of Yale College, a merchant, and an authority on finance and currency. "The Constitution," he urged, "must vest power in every

department sufficient to secure and make effectual the ends of it." Among the remedies which he proposed were: the grant of power to what he called the "supreme authority" to impose taxes directly; a change in the basis of apportioning contributions among the states from land value to population; a federal legislature of two houses, every state to send one or more delegates to each house; and "ministers of state" whose advice must be taken by the federal legislature. A peculiar suggestion, showing the results of the writer's training, was that to establish a "chamber of commerce" whose advice must be taken by the federal legislature on all measures affecting trade. To enable the federal government to enforce its acts, Webster would authorize it to send troops into any state. Since he was a man of sufficient reputation to be consulted by congress on financial and commercial questions, it is probable that his pamphlet was read by persons eager for a change in the governmental system.

Of somewhat more general interest, and probably of wider influence, was a tract written by Noah Webster of Connecticut, a pioneer in the field of American education and the author of a famous spelling book and dictionary. It is entitled *Plan of Policy for Improving the Advantages and Perpetuating the Union of the American States* and was published early in 1785, when the weaknesses of the Confederation were daily becoming clearer. The author had spent the half dozen years since

his graduation from Yale in teaching school, studying law and preparing his spelling-book. In 1782 and the years immediately following he undertook a series of journeys through the states to secure the enactment of copyright laws for the protection of his book, and it is likely that the knowledge which he thus gained served to broaden his political outlook and free him, to some extent, from provincial prejudices. At any rate in the *Plan of Policy* he wrote: "We ought to generalize our ideas and our measures. We ought not to consider ourselves as inhabitants of a particular state only; but as *Americans.*" Many men before him had pointed out, and in greater detail than he did, the inadequacy of the Articles of Confederation, but he made a fruitful suggestion when he proposed that the federal government ought to be modeled on the state governments.

"Let the government of the United States," he said, "be formed upon the general plan of government in each of the several states. . . . The general concerns of the continent may be reduced to a few heads; but in all the affairs that respect the whole, Congress must have the same power to enact laws and compel obedience throughout the continent, as the legislatures of the several states have in their respective jurisdictions. . . . Unless Congress can be vested with the same authority to compel obedience to their resolution, that a legislature in any state has to enforce obedience to the laws of that state, the existence of such a body is entirely need-

less and will not be of long duration. . . . Let the president be, *ex officio,* supreme magistrate, clothed with authority to execute the laws of Congress, in the same manner as the governors of the states are to execute the laws of the states. . . ."

The document was reprinted in the *Maryland Gazette,* and years afterwards Madison wrote to Noah Webster in words implying that his pamphlet had attracted wide attention. It contains what seems to be the first constructive proposal to organize the federal government upon the political principles with which all Americans were familiar in their state governments.

We now come to what may be regarded as in a sense the climax of the history of the United States under the Confederation. While creditors throughout the country were suffering from paper money and legislation in the interest of debtors, and when the conservative classes in general were in despair over "democratic" propaganda injurious to vested rights, there occurred an uprising which powerfully strengthened the movement for a federal government strong enough to protect property and maintain law and order. The disturbances in Massachusetts, which culminated in 1786, may be viewed as the culmination of a levelling agitation which had been in progress ever since the war. To a great extent the Revolution had been guided by the conservative classes, the planter aristocracy of the south, merchants and lawyers in New England

and the middle states, men of education and property. But ideas of equality, expressed in the Declaration of Independence, aroused among the poorer classes envy of their more prosperous neighbors, while the emphasis placed upon liberty tended to relax respect for government. Office holders, legislators and judges were suspected of tyrannical designs and conspiracy against the "people." Men who had fought for the cause of freedom were unable to appreciate the brand of liberty which threw them into debtors' prisons. It is not difficult to understand how many an ardent "patriot" viewed the payment of debt as something to be avoided, and how respect for property rights declined. Of these facts, paper money agitation and tender laws furnish abundant proof. Creditors, speculators, merchants, money lenders, courts and lawyers were objects of popular suspicion. In a remarkable letter to Washington, written in October, 1786, in the midst of a desperate insurrection, General Knox of Massachusetts, whose traditions and interests attached him strongly to the conservative classes, thus described the objects of the insurgents in that state.

". . . they see the weakness of government: they feel at once their own poverty compared with the opulent, and their own force, and they are determined to make use of the latter in order to remedy the former.

"Their creed is, that the property of the United States has been protected from the confiscations of

Britain by the joint exertions of all; and therefore ought to be the common property of all; and he that attempts opposition to this creed is an enemy of equality and justice, and ought to be swept from the face of the earth. In a word, they are determined to annihilate all debts public and private, and have agrarian laws, which are easily effected by the means of unfunded paper money, which shall be a tender in all cases whatever. . . . We shall have a formidable rebellion against reason, the principle of all government, and against the very name of liberty."

It is difficult to state precisely the specific causes of the outbreaks in Massachusetts in 1786. As has been said, all the interests of New England had suffered severely from the war. It is true that in 1786 crops were good, and manufacturing was increasing. But the advent of peace had been followed by an immediate demand for foreign luxuries, for which many consumers ran in debt; and increasing importations tended to drain specie out of the country. Good money went out of circulation, debtors found it impossible to meet their obligations, and the clamor for relief became general. A contemporary estimated the total state debt of Massachusetts at the close of the Revolution at £3,050,000. Counties and towns, too, had incurred indebtedness, and in consequence taxes were heavy. Farmers complained that the merchants were responsible for the growth of luxury and the scarcity of money and urged that taxation should

be thrown upon commerce. Merchants found no difficulty in arguing that agriculture should pay its share. The burden of private debt was certainly one of the more important causes of unrest. Foreclosures of mortgages were numerous and kept lawyers and courts busy. Not a little of the prevailing distress was attributed to the legal profession, for the lawyers were growing richer while the people were growing poorer.

As early as 1782 the Massachusetts legislature had passed a limited tender act, providing that for a period of one year debts might be discharged in "neat cattle," and other articles at the appraisal of impartial men. This measure led to the curious result of creditors dodging their debtors! Says a contemporary writer:

"It was the first signal for hostilities between creditors and debtors, between the rich and the poor, between the few and the many. . . . The multitude of debtors first felt from it, at an hour when their perplexities might lead them to an undue use of an advantage, that their creditors were under their control. . . . This principle rapidly increased, and pretences sprung out of it, in many instances, for stopping the execution of law in private cases, and, at length, for the bolder attack upon the courts themselves."

Under such conditions a great agitation for paper money was inevitable. By means of private petitions, instructions to delegates, frequent elections

and county conventions strong pressure was brought to bear upon the legislature. In 1786 a petition from a convention of Bristol county asked for paper money, but it found favour with only 19 out of the 118 members of the lower house. A convention of delegates from fifty towns in Hampshire County met at Hatfield, 22 August, 1786, and drew up a list of grievances. Complaint was made, among other matters, of the state senate, of the method of representation, of the existence of some of the courts, of the fee system, of the method of paying state debts, of the existing mode of taxation and of the lack of currency. The convention advised the several towns of the county to instruct their representatives to use their influence in the next legislature "to have emitted a bank of paper money, subject to depreciation; making it a tender in all payments, equal to silver and gold, to be issued in order to call in the commonwealth's securities."

Nor did agitation stop there. In August, 1786, a band of insurgents forcibly prevented the sitting of the court at Northampton, and shortly afterward another body took possession of the court-house at Worcester. At Great Barrington the rebels not only prevented the sitting of the court, but broke open the jail and liberated the prisoners. Governor Bowdoin summoned the legislature in special session, but when it met several members of the lower house were found to be more or less in sympathy with the insurgents. Redress of griev-

ances was promised, and a tender act, limited in operation to eight months, was passed. Meanwhile at Springfield, matters had almost come to bloodshed. The governor sent troops to protect the court, but on the day when it was to meet, a body of insurgents, almost equal in number to the state troops, appeared under command of Captain Shays, a veteran of the Revolution. The court adjourned without transacting any business, and the forces dispersed without an engagement. In December, however, a band of insurgents under Shays gathered at Worcester; to cope with the situation a force of 4,000 troops, raised with funds loaned by wealthy citizens of Boston and other cities, was placed under command of General Lincoln. The rebels concentrated at Springfield but retreated without giving battle. They were pursued and routed, and the revolt, which has gone by the name of Shays's Rebellion, collapsed. It is worthy of note that none of the rebels, not even Shays, was punished, and Governor Bowdoin was rewarded for his efforts in behalf of law and order by a decisive defeat at the polls for re-election the next year.

Conservative and law-abiding men throughout the country were thoroughly alarmed and confirmed in their belief that nothing but a thorough overhauling of the political system and a large increase in the power of the central government could prevent the recurrence of such outbreaks in the future.

"This dreadful situation," wrote General Knox, ". . . has alarmed every man of principle and property in New England. Our government must be braced, changed, or altered to secure our lives and property. . . . The men of property and the men of station and principle [in Massachusetts] . . . are determined to endeavor to establish and protect them in their lawful pursuits. . . . They wish for a general government of unity, as they see that the local legislatures must naturally and necessarily tend to retard the general government. . . . Every friend to the liberty of his country is bound to reflect, and step forward to prevent the dreadful consequences which shall result from a government of events. . . ."

The rebellion was suppressed without federal aid. Congress did provide, it is true, for raising troops for the assistance of Massachusetts, if necessary, but deemed it discreet to give out that they were for the defence of the frontiers against the Indians; and it is pathetic evidence of its sense of impotence that it was apprehensive about putting arms into the hands of men who might use them to obtain their pay! A government could sink no lower.

Experience pointed to the almost certain failure of any attempt that might be made by congress to secure an enlargement of its powers. There was a possibility, however, that if a convention could be assembled for the purpose of proposing amendments to the Articles of Confederation, its recom-

mendations would be treated with more respect by the states. The idea of holding such a convention was not new. As early as 1776 Paine had written in *Common Sense:*

"Let a continental conference be held, to frame a continental charter, drawing the line of business and jurisdiction between members of Congress and members of assembly, always remembering that our strength and happiness are continental, not provincial."

And in the pamphlet *Public Good,* published in 1780, he returned to his earlier proposal. Hamilton, in the Duane letter, already referred to, went so far as to advocate a convention with authority to adopt a "vigorous general confederation"; and in July, 1782, the legislature of New York, under his influence, asked congress to recommend the meeting of a general convention authorized to amend the Articles of Confederation, "reserving a right to the respective legislatures to ratify their determinations." In April of the following year congress appointed a committee to report on the New York resolutions, but the report recommended postponement of further consideration of a convention. In 1785 the Massachusetts legislature, at the instance of Governor Bowdoin, adopted a resolution declaring the Articles of Confederation to be inadequate and recommending a convention for the purpose of revising them. The Massachusetts delegates in congress were instructed to present this

resolution, but they declined to do so, giving as one of their reasons that the calling of such a convention would lead to "an exertion of the friends of an Aristocracy to send members who would promote a change of Government." Such a fear was by no means fantastic at a time when some men were whispering that only a monarchy could cure the ills from which America was suffering. Thus it appears that the idea of a convention to propose amendments was becoming a commonplace in political discussions.

The actual meeting of the Federal Convention of 1787, which drafted the present Constitution of the United States, was the result of a peculiar train of circumstances. Washington, who had acquired large tracts of land in the west, was one of those who most clearly foresaw and desired the westward movement of population and was especially interested in improving water communication between east and west by way of the Potomac, which would increase the trade and prosperity of Virginia. But to carry out any plan involving the navigation of the Potomac, the concurrence of Maryland was necessary, since the river was common to both states. Jefferson and Madison and many other Virginia politicians shared Washington's interest, and in June, 1784, the Virginia house of delegates adopted a resolution framed by Madison, appointing commissioners to meet with those of Maryland for the purpose of formulating measures respecting the Potomac, to be reported to the legislature of

Virginia. Commissioners from these two states met at Mount Vernon, Washington's home, in March, 1785. They drafted an agreement concerning jurisdiction over the waters common to both states, asked Pennsylvania to grant free use of branches of the Ohio within its boundaries in order to establish connection between that river and the Potomac, and recommended that Virginia and Maryland should adopt uniform import duties, commercial regulations and currency, though such an agreement between states, except with the consent of congress, was expressly forbidden by the Articles of Confederation. In November, 1785, the legislature of Maryland went a step farther and proposed that the legislatures of Pennsylvania and Delaware should be invited to send commissioners to meet with those of Maryland and Virginia to adopt a uniform commercial system.

It occurred to Madison that this was a favorable moment for proposing a convention of *all* the states, and he introduced in the Virginia house of delegates a resolution for the appointment by Virginia of commissioners to meet with those of the other states in a general convention for the purpose of considering commercial conditions and reporting an amendment to the Articles of Confederation. This resolution having been adopted by the legislature of Virginia, the governor sent invitations to all of the other states asking them to choose commissioners to meet at Annapolis on the first Monday in September, 1786. It was thought prudent not

to hold the convention in Philadelphia, where it might have been suspected of falling under the influence of congress, nor in any of the other large commercial towns, lest its recommendations should be viewed as inspired by the mercantile interest. Madison was evidently not optimistic of the results of the convention, for he wrote: "The expedient is no doubt liable to objections and will probably miscarry. I think, however, it is better than nothing and . . . it may possibly lead to better consequences than at first occur." There is evidence that the proposed convention was regarded by many persons as merely preliminary to a later one to effect thorough-going changes in the federal government. "Many gentlemen," wrote Madison in August, 1786, "both within and without Congress, wish to make this meeting subservient to a plenipotentiary Convention for amending the Confederation." And Monroe wrote early in September: "I consider the convention at Annapolis a most important era in our affairs. The Eastern men, be assured, mean it as leading farther than the object originally comprehended."

Though nine states had appointed delegates, only five—Virginia, Delaware, Pennsylvania, New Jersey and New York—were actually represented at the Annapolis Convention. There is reason for believing that the failure of some of the delegates to reach Annapolis is to be explained by a desire that the meeting should do nothing but serve as a preliminary to a subsequent convention. The

French minister to the United States wrote home that those responsible for the Annapolis Convention "had no hope, nor even desire, to see the success of this assembly of commissioners, which was only intended to prepare a question much more important than that of commerce. The measures were so well taken that at the end of September no more than five states were represented at Annapolis, and the commissioners from the northern states tarried several days at New York, in order to retard their arrival." In view of the small attendance, the members of the convention decided not to enter upon the business for which they had been sent, but instead to make a report to the states represented at the convention. This document, probably drafted by Hamilton, recommended the appointment of delegates to meet at Philadelphia on the second Monday of May, 1787, to take into consideration the situation of the United States and propose amendments to the Articles of Confederation. On February 21, 1787, Congress ignoring this report, but recommending a convention to be held at the time and place specified therein, adopted the following resolution:

"That in the opinion of Congress, it is expedient, that on the second Monday in May next, a convention of delegates, who shall have been appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures, such alterations and pro-

visions therein, as shall, when agreed to in Congress, and confirmed by the states, render the federal constitution adequate to the exigencies of government, and the preservation of the union."

It turned out that in sanctioning the Philadelphia Convention the old congress was in effect signing its own death warrant.

Before the close of 1786, without waiting for congressional action, six states appointed delegates to the convention to be held at Philadelphia, and Virginia made a master-stroke by placing at the head of its delegation the name of George Washington. By May, 1787, all of the other states had followed suit, except New Hampshire and Rhode Island. New Hampshire acted tardily, and its delegates did not arrive in Philadelphia until after the convention had been in session for some time. Rhode Island, under the influence of the paper money party, refused to appoint delegates at all. However, a committee, representing the mercantile interests of the state, sent a letter to the convention, expressing regret at Rhode Island's non-compliance with the recommendation of congress and promising to support the work of the convention.

Neither the Annapolis Convention nor congress had specified how the delegates should be chosen. Appointment by the state legislatures, the method followed in choosing representatives in congress, was the normal one and was adopted by every state. Thus the delegates were chosen indirectly

by the people, or rather by so many of them as were permitted by state law to exercise the franchise. In no state had the principle of universal adult male suffrage been adopted at this time. Statistics regarding the proportion of the population unenfranchised in the several states are wanting, but restrictions on the suffrage were generally in force. The most customary qualification for the franchise was the "freehold" qualification. This did not, however, withhold the vote from as large a portion of the community as would be the case today, for the distribution of land-ownership was much wider than it is at present. For delegates it was natural that those who took most interest in the convention and were especially opposed to a continuance of existing conditions should put themselves forward.

Virginia, the Old Dominion of colonial days, was the most populous state in the union. It had taken a leading part in the agitation that culminated in the revolt of the colonies; its sons had distinguished themselves on the battlefield and in politics during the Revolution; and many of its most influential citizens were now deeply interested in a change in the governmental system. Its response to the recommendations of the Annapolis Convention, for whose meeting it had been mainly responsible, was immediate and gratifying to all who were eager to strengthen the federal government. The legislature directed that seven delegates should be chosen, by joint ballot of both houses, to

represent the state at Philadelphia, any three of whom were empowered to join with the delegates of the other states in discussing changes "necessary to render the Federal Constitution adequate to the Exigencies of the Union" and in reporting "such an Act for that purpose to the United States in Congress as when agreed to by them and duly confirmed by the several States will effectually provide for the same." It was in many respects a remarkable group of men that Virginia sent to Philadelphia.

Washington, unquestionably the foremost citizen of the country, the most influential and perhaps the wealthiest man in the United States, headed the list and lent to the convention the weight of his great and honored name. He had previously announced that he would take no further part in public affairs, but yielding to strong pressure, he abandoned his resolution. Several weeks before the convention met he expressed the hope that it would adopt no temporizing expedients, but "probe the defects of the constitution to the bottom, and provide a radical cure." From Virginia also came Edmund Randolph, the governor of the commonwealth, a lawyer of large practice and formerly attorney-general of his state, and George Mason, famous as the author of the Virginia bill of rights. James Madison, another Virginia delegate, was the scholar and political philosopher of the convention. A graduate of Princeton College, he had taken an active part in politics, having served in the legisla-

ture of his own state and in congress. His interpretation of politics was economic. Long before Karl Marx discovered the key to history in class struggle, years before he was born, this learned but unpretentious Virginia gentleman wrote in *The Federalist* (No. 10):

". . . the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government."

Madison had pondered deeply upon the defects of the Confederation and projects for its reform. He was in favor of radical change and had busied himself, before the meeting of the convention, in working out a new plan of federal government. While not a great orator, his utterances, supported as they were by knowledge, always commanded respect. He had more to do with the framing of the Constitution than any other man. Patrick

Henry, the leading American orator and agitator during the stormy period preceding the Revolution, the idol of the plain people of his state, of wide influence and great popularity the country over, was appointed a delegate but declined to serve. Impassioned appeals to liberty and diatribes against tyranny were more in keeping with his genius than the building of a strong government. He had imbibed a profound distrust of the northern states on account of their attitude in connection with the recent negotiations with Spain, and was loath to draw closer the political bonds which united them to the south. By temperament, too, he was suspicious of the classes and the leaders who were supporting the Philadelphia Convention. The story goes that when asked why he had not served as a delegate, he answered dramatically: "I smelt a rat."

Three of the New Jersey delegates deserve mention. William Paterson, a native of northern Ireland, had come to the United States when a child. He was a graduate of Princeton, a lawyer, a member of the Continental Congress, and a signer of the Declaration of Independence. He played an important rôle in the convention, championing the interests of the small states. William Livingston, governor of New Jersey, was a member of the influential New York family of that name. He was a graduate of Yale, a leading member of the New Jersey bar, and had been many times reelected chief executive of the state. Captain Jonathan

Dayton, a "veteran" of the Revolution, though only twenty-seven years old in 1787, was actively engaged as a trader in public securities and military certificates on a large scale, and later, as speaker of the house of representatives, he continued his speculations.

At least four men of mark represented Pennsylvania. In the scope of his intellectual interests and the diversity of his public services, Benjamin Franklin was peerless among his countrymen. Alone of Americans he had achieved a world-wide reputation in science. But neither intellect nor fame had removed him from the concerns of the common folk. His life spanned the whole formative period of American union, and now, full of years and of honors, he came to put at the service of young America his experience and his wisdom. At the age of eighty-one, in the twilight of a great and unique career, he did not take a very active part in the deliberations at Philadelphia, but reminiscences of his old wit and kindliness occasionally light up the matter-of-fact records of the convention. Like Sophocles, he saw life steadily and saw it whole. The member of the Pennsylvania delegation who probably exercised the greatest influence at Philadelphia was the Scotchman, James Wilson. He was one of the ablest lawyers in the United States, versed in politics and history, and unquestionably a man of intellectual power. He was intimate with the leading merchants of Philadelphia, a stockholder in

various corporations and engaged in land speculation. Robert Morris, the "Financier of the Revolution," was born in England but came to America at an early age. He entered mercantile life in Philadelphia, the largest city in the United States, and developed remarkable aptitude for "big business" and "high finance." His interests were as wide as America itself, including commerce and shipbuilding, manufacturing, land speculation, banking and public securities. There is no record of his having addressed the convention, though he had the reputation of being a weighty speaker. His experience, interests and connections, however, must have given him no little influence. Gouverneur Morris was one of the most brilliant members of the convention. He belonged to the well-known Morris family of New York but had moved to Pennsylvania. He was a graduate of King's College (now Columbia), a lawyer and actively interested in politics. He had embraced the Revolutionary cause, but had no sympathy with radical or democratic tendencies, and he took a cynical view of human nature. He had been a member of the Continental Congress, was actively interested in banking and commerce, and for several years had acted as assistant to Robert Morris. He was strongly opposed to legislation for the relief of debtors and wrote forcefully against it. He was possessed of a clear and terse literary style, and the phraseology of the Constitution is attributable principally to him.

North Carolina, a backward and unprogressive state, sent a delegation in keeping with its character. None of its delegates impressed his personality upon the convention.

By all means the leading representative of the little state of Delaware was John Dickinson. Famous throughout the United States for his opposition to parliamentary taxation of the colonies and the rôle which he had played in the events leading up to the Revolution, he had served in the Continental Congress and had acted as chairman of the committee which drafted the Articles of Confederation. Though not a great orator, he was a scholarly man of wide information. The independence of his character is attested by the fact that he had risked his popularity by refusing to sign the Declaration of Independence, which he considered premature. He had been chief executive of both Delaware and Pennsylvania. A lawyer by profession, he was connected by marriage with a wealthy commercial family and was on familiar terms with Robert Morris, Thomas Willing and other leading financiers and merchants of Philadelphia.

William Few, of Georgia, was almost the only member of the convention who had sprung from the small farmer class. Born in Maryland, he had moved to Georgia in 1776 and embraced the Revolutionary cause. Without any systematic knowledge of law he began the practice of that profession in a community where an attorney needed little

legal learning. He must have prospered, for he himself is authority for the statement that his "pecuniary prospects were very flattering" in 1787. Abraham Baldwin, the strongest member of the Georgia delegation, was a native of Connecticut, a graduate of Yale, and had served as a chaplain in the Revolutionary Army. Moving to the south he had begun the practice of law in Savannah, and had been chosen to the legislature of Georgia and to congress. He appears to have been a man of broad social outlook, with a deep interest in education. William Pierce, another representative of Georgia, put posterity under obligation to him by making notes on his fellow-delegates, which, while not always perfectly accurate, throw light on the human side of the convention.

New York was represented by three delegates. The first, Robert Yates, a judge of the supreme court of the state, had formerly been a member of the New York provincial congress and of the committee which drafted the New York constitution of 1777. John Lansing, the second delegate, was a lawyer, and had served as a member of the New York legislature, as mayor of Albany, and as delegate to congress. Both were state-sovereignty men and withdrew from the convention at an early date and opposed the adoption of the Constitution. The greatest statesman in the entire convention was the third delegate from New York, Alexander Hamilton. It is true that he exercised little influence upon his fellow-delegates, to whom his views in

favor of a highly centralized government seemed extreme, and he contributed little to the framing of the Constitution. He was entirely out of sympathy with his two colleagues from New York, who, as long as they remained in Philadelphia, usually cast the vote of the state against him, and he was frequently absent from the sessions of the convention. "The gentleman from New York," remarked a fellow-delegate, "has been praised by everybody, he has been supported by none." But Hamilton's was the constructive organizing genius that was later to make the Constitution drafted at Philadelphia a practical success. Born in the British West Indies, the son of a Scotch father and a mother of French Huguenot descent, he developed, as a boy, an astonishing maturity of intellect. In 1772 he came to New York and soon entered King's College, where his course of study was interrupted by the outbreak of the Revolution. He joined the army, became a member of Washington's staff, and enjoyed the complete confidence of the commander-in-chief. No man had done more than Hamilton to point out the weaknesses of the Articles of Confederation and to urge reforms. A lawyer of exceptional ability, he was in close contact with the business interests of New York City; and by marriage he was connected with the aristocracy of the state. He had served in the New York legislature and in the Continental Congress, and he had been the moving spirit in the Annapolis Convention. He was a strong nationalist, but he had no sympathy

with democracy, believing that the masses were incapable of self-government.

The South Carolina delegation was a strong one. John Rutledge, a planter and slave owner, was a distinguished lawyer and had served in congress and as governor of his State. Charles Pinckney, one of the youngest members of the convention, was a lawyer of Charleston and a slave owner. He was vigorously opposed to paper money and owned large amounts of public securities. His cousin, General Charles Cotesworth Pinckney, also a delegate, had received a thorough classical and legal training in England and had served with credit in the Revolution. He was a successful lawyer of Charleston, an owner of land and of public securities.

Elbridge Gerry of Massachusetts was a graduate of Harvard and had been active in state politics. He had represented his state in congress and had signed the Declaration of Independence. As a merchant he had been particularly impressed with the commercial weakness of the Confederation and had urged that the regulation of trade be given to congress. Himself a public security holder on a large scale, he was an active champion of the interests of bondholders and speculators, and while a member of congress he had invested extensively in western lands. Pierce describes him as a "man of property." Nathaniel Gorham had been a member of the Massachusetts legislature, of the convention which drafted the state constitution of 1780

and of congress. He was a successful merchant of Charlestown, and was personally interested in western land speculation. Rufus King, educated at Harvard, had served in congress and had been opposed to radical change in the federal government. He was a man of property and of learning and had married the daughter of a leading New York merchant. Pierce ranks him among "the Luminaries of the present Age."

From Connecticut came three delegates. William Samuel Johnson, the son of a clergyman of Stratford, Connecticut, was a graduate of Yale and a lawyer. He had refused to join the Revolutionary cause, but after the war he had built up a large practice at law. He had a great reputation for learning, both legal and classical, and because he had received the degree of Doctor of Laws from Oxford, was always referred to respectfully as "Doctor" Johnson. He had recently been chosen president of Columbia College. Roger Sherman, the shoemaker of New Milford and mayor of New Haven, was a self-made man, who, by industry and frugality, had acquired a competence. He had risen to be a lawyer and a judge, but Pierce comments on "the oddity of his address, the vulgarisms that accompany his public speaking, and that strange New England cant" which characterized him. While a storekeeper in New Milford, he had suffered losses through depreciation of the currency and was a bitter opponent of paper money in all forms. He had been a member of congress and

had signed the Declaration of Independence and the Articles of Confederation. In politics he was strongly on the side of state sovereignty. Oliver Ellsworth had been educated at Yale and Princeton. A lawyer of great learning, he had built up an extensive practice at the bar and had been appointed a judge of the supreme court of Connecticut. He was actively interested in banking, money lending, real estate and public securities.

Maryland was represented by a group of men which must be pronounced, on the whole, mediocre. Luther Martin, the strongest member of the delegation, was a graduate of Princeton and a successful lawyer. He had served as a member of congress and as attorney-general of his state. Pierce records that in the convention he was "so extremely prolix, that he never speaks without tiring the patience of all who hear him." He was not a man of large fortune and was one of the very few members of the convention who were friendly to debtors and to paper money.

The tardiness of New Hampshire in sending delegates seems to have been caused by the unwillingness of the state to pay their expenses. However, John Langdon, a wealthy merchant of Portsmouth, came forward and offered to defray the cost himself. Delegates were finally appointed and reached Philadelphia toward the close of July. Langdon, who was one of them, had been active in politics, having served his state as legislator, chief executive and member of congress. He had made a great

fortune in commerce and was known as the Robert Morris of New Hampshire. He held large amounts of United States paper, and both as bondholder and merchant was personally interested in strengthening the government.

In all sixty-two delegates were appointed; fifty-five attended some of the sessions of the convention, and thirty-nine put their names to the Constitution which the convention framed. Though sober history cannot accept Jefferson's eulogy of the convention as an "assembly of demi-gods," it must be admitted that it contained a considerable number of able and a few remarkable men. The average age of the members was about forty-two. A large majority were lawyers, with experience in public life; only a few had seen military service in the Revolution. They were men of affairs, whose business interests and associations combined with their knowledge of practical politics to make them keenly sensitive to the defects of the existing régime.

CHAPTER III

THE FRAMING OF THE CONSTITUTION

On account of the failure of delegates to reach Philadelphia on time, the result partly of bad weather and partly of a tardiness characteristic of the public life of the day, the convention was unable to organize until May 25, nearly a fortnight after the date set for its meeting, when Washington was unanimously chosen president and a secretary was appointed. A few days later rules of procedure were adopted. It was determined that each state should have one vote in the convention, as was the case in the congress of the Confederation. The great political cleavage in the country at this time was not sectional—not between north and south, nor even between east and west—but between large and small states, and the rule of state equality in the convention was, of course, favorable to the latter. It was also decided that seven states should constitute a quorum, and that sessions should be secret. Nothing spoken in the convention was to be published or communicated without leave. Secrecy, it was hoped, would free the convention from outside influence and enable it to submit the results of its deliberations to the country without

divulging knowledge of the processes by which conclusions had been reached or of the opinions expressed by individual members in the course of debate.

The Virginians, who had arrived in advance of most of the other delegations, met frequently in informal caucus and drafted a series of resolutions, largely the work of Madison, which were presented to the convention on May 29 by Governor Randolph. The Virginia Plan, as the resolutions are called, provided for a division of the central government into three departments, legislative, executive and judicial; a legislature of two houses with enlarged powers, in which the representation of states should be proportional either to quotas of contribution or to free population, the members of the lower house to be elected by the people and those of the upper house by the lower house out of persons nominated by the state legislatures; an executive to be chosen by the legislature and to be ineligible for a second term; and a judicial department to consist of a supreme court and inferior courts. The general or "national" legislature, as it was called, was to have power to pass on the constitutionality of state laws and to call forth the force of the union against any state that failed to fulfil its federal obligations; and acts of the national legislature were to be subject to review by a council of revision to consist of the executive and a part of the judiciary. The legislative, executive and judicial authorities of the states were to be bound

by oath to support the federal Constitution. The Virginia Plan may be called the large-state plan. It will be observed that it proposed changes in the structure and character of the federal government so sweeping that they could scarcely be regarded merely as a series of amendments to the Articles of Confederation. How far the delegates were bound by their instructions was a subject of dispute in the convention, but had these been followed literally, the convention could have done no more than propose amendments to the Articles. The great historical importance of the Virginia Plan lies in the fact that from it, with many changes, the Constitution in its final form was evolved.

On May 29, the same day that the Virginia Plan was put before the convention, another set of proposals was presented by Charles Pinckney of South Carolina. Perhaps on account of his youth, Pinckney's plan does not seem to have been taken very seriously. Like the Virginia Plan, it was referred to the committee of the whole, which took no action upon it, though some use of it was made later by a special committee. The Pinckney Plan has been the subject of considerable scholarly wrangling among the pundits of the American Historical Association and others, into which it is unnecessary to enter here. It is enough to say that the document which has been printed as the Pinckney Plan is spurious and that no authentic copy of the original has yet come to light.

Later, in the course of debate, on June 18, Hamil-

ton read in the convention a sketch which he intended not as a plan to be acted upon but merely as an indication of his own ideas and a suggestion of amendments which he would probably propose to the Virginia Plan. It shows Hamilton in favor of a powerful central government, with the states reduced almost to the level of provinces. It had little if any influence; and on the last day of the convention Hamilton himself, in urging every member to sign the Constitution, said that "no man's ideas were more remote from the plan [i.e., the Constitution] than his were known to be." It was reserved for imaginative spirits of later days to represent Hamilton as the author of the Constitution.

The small-state party in the convention was rather slow in organizing, and it was not till June 15 that their proposals, embodied in what is called the New Jersey Plan, were presented by Paterson of New Jersey. Its supporters called it a "federal" plan in contrast with the "national" Virginia Plan. Unlike the latter it preserved the principle of state equality, and its proposals were made as amendments to the Articles of Confederation. Congress was to remain a single-chamber assembly, in which each state was to have one vote, though it was to be invested with additional powers, especially in the important matters of taxation and commerce. There was to be a separate executive chosen by congress, and a supreme federal tribunal. Acts of congress and treaties were to be the

"supreme law of the respective states" and it was provided that "the judiciary of the several states shall be bound thereby in their decisions, anything in the respective laws of individual states to the contrary notwithstanding." The federal executive was to be authorized to use force if necessary to execute such acts or treaties.

In the consideration of the work of the convention that follows, chronology will, for the most part, be disregarded, but it will make for clarity if we have in mind in advance the consecutive stages in the drafting of the Constitution. The convention, in committee of the whole, debated the Virginia Plan from May 30 to June 13, when it reported a series of 19 resolutions based on that plan with some modifications. On June 19 the committee of the whole, to which the New Jersey Plan had meanwhile been referred, reported in favor of its former resolutions as against that Plan, and debate on these resolutions began. It lasted till July 26 when twenty-three resolutions agreed upon by the convention were referred to a committee of detail, charged with preparing a draft Constitution, and the convention adjourned to August 6, to give the committee time to do its work. From August 6 to September 10 the convention debated, clause by clause, the Constitution reported by the committee of detail. On September 10 the Constitution, as agreed upon, was referred to a committee of style, which made its report two days later. From September 13 to 15 the convention compared the

Constitution as reported by the committee of style with the draft which had been referred to that committee. On September 15 the completed Constitution was agreed to by the convention, and on September 17 the convention adjourned *sine die.*

It has always been understood that the Federal Convention met to improve the government of the United States, but the spirit in which its members went to their work has not so generally been apprehended. The Fathers were practical men. They lived at a time when a decent respect for the proprieties of political discussion required at least occasional reference to Locke and Montesquieu, and if an impression of familiarity with Grotius or Vattel could be conveyed by an apposite quotation, so much the better; but one who goes through the debates of the convention is likely to feel that such excursions into political philosophy as were made are to be regarded rather as purple patches than as integral parts of the proceedings. The scholarly Madison had gone extensively into the subject of Greek federalism, and he gave the convention the benefit of some of his researches in that field; but it was his experience in public life and his wide knowledge of the conditions of his day, not his classical lucubrations, that bore fruit at Philadelphia. In a diffuse harangue extending over two days—hot days, too—Luther Martin ranged freely over the history of political theory, but he seems to have bewildered and fatigued rather than enlightened or influenced his hearers. This is not to

say that political theory did not count in the work that the convention did. Theories, political and other, that win general acceptance become a part of social heritage, and the influence over men exercised by their social heritage is not to be questioned. In this sense the Americans of 1787 were all disciples of John Locke, even those who had never read a page of Locke. The state of nature, the social compact, inherent individual rights, limitations on government, the right of revolution, were axiomatic in the thought of the time. But the debate at Philadelphia did not proceed along theoretical lines. John Dickinson expressed the prevailing point of view when he said in the convention: "Experience must be our only guide. Reason may mislead us."

> "God has conceded two sights to a man—
> One, of men's whole work, time's completed plan,
> The other of the minute's work, man's first
> Step to the plan's completeness."

The thought expressed in these words of Browning's must have come now and then to a mind in the convention, given to speculating, in off hours, on "larger meanings" and "ultimate purposes." But while the convention was in session it was "the minute's work" that claimed attention. Another constitution was soon to be brought forth in another land. No doubt the doctrinaire character of the French National Assembly of 1789 has been greatly exaggerated, but when all is said the

fact remains that the document which it produced breathes a spirit one does not catch in reading the American Constitution. Philadelphia yielded nothing comparable to the Declaration of the Rights of Man.

Professor Max Farrand, the editor of the *Records of the Federal Convention,* has compiled from the writings of the members of the convention, prior to its meeting, a list of what they regarded as the defects of the Articles of Confederation, and his opinion, based on a detailed knowledge of the proceedings of the convention, is that there is little of importance in the Constitution that did not arise from the effort to correct these specific defects. In a document written toward the close of his life Madison, after enumerating the principal weaknesses of the Confederation, uttered this caution: "Such were the defects, the deformities, the diseases and the ominous prospects, for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding and appreciating the Constitutional Charter, the remedy that was provided." These words of the "Father of the Constitution" sound like a protest against judicial interpretation of the Constitution by judges ignorant of its historical setting and, therefore, unable to fathom the original intent of its provisions. Unfortunately, a knowledge of American history has not yet been made a prerequisite for admission to the Supreme Court.

An exhaustive investigation conducted on the line suggested by Madison's injunction would be nothing less than an historical commentary on the Constitution, and this is not the place for such an ambitious undertaking. But we must inquire, at least briefly, into the therapy which the diagnosticians at Philadelphia prescribed for the ailing body politic.

The vital defect in the Articles of Confederation, as has been pointed out, was state sovereignty. It was not that congress lacked this or that specific power, but that it could not in practice exercise effectively the powers that it nominally possessed; it was not that sufficient limitations were not placed on the states, but that they could not, in fact, be compelled to observe the limitations that were placed upon them. This, I take it, was what Madison meant when he wrote in *The Federalist,* shortly after the Constitution had been framed:

"The truth is, that the great principles of the Constitution proposed by the Convention may be considered less as absolutely new, than as the expansion of principles which are found in the Articles of Confederation. . . . If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of *New Powers* to the Union, than in the invigoration of its *Original Powers.*"

State sovereignty, there was the enemy. How did the convention go about to curb it?

In the first place, in the all-important matters of taxation and defence, it put the federal government in direct relations with the people of the United States. "The Congress," says the Constitution, "shall have Power to lay and collect Taxes, Duties, Imports and Excises," and "to raise and support Armies." The new congress, provided for in the Constitution, would not have to depend, like the congress of the Confederation, on requisitions on the states for revenue and for soldiers. This new, direct relationship between the federal government and the people involved a new conception of federalism, which was clearly perceived and pointed out in the convention. In opposing the election of members of the upper house of the proposed federal legislature by the state legislatures, James Wilson, as reported by Madison, said:

". . . it was necessary to observe the twofold relation in which the people would stand. 1. as Citizens of the Genl. Govt. 2. as Citizens of their particular State. The Genl. Govt. was meant for them in the first capacity: the State Govts. in the second. Both Govts. were derived from the people —both meant for the people—both therefore ought to be regulated on the same principles. The same train of ideas which belonged to the relation of the Citizens to their State Govts. were applicable to their relation to the Genl. Govt. and in forming the latter, we ought to proceed by abstracting as much as possible from the idea of State Govts. With respect to the province & objects of the Genl.

Govt. they should be considered as having no existence. . . . The Genl. Govt. is not an assembly of States, but of individuals for certain political purposes—it is not meant for the States, but for the individuals composing them; the *individuals* therefore not the States, ought to be represented in it."

Wilson clearly grasped the principle of that dualism of government which is the essence of American federalism.

But it was not sufficient to empower the federal government to act directly on individuals. How were the states to be prevented from exercising powers denied to them, from treating the new Constitution, as they had treated the old Articles, as a "scrap of paper"? The Virginia Plan proposed to give the national legislature power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." The New Jersey Plan which, it will be recalled, was proposed as a series of amendments to the Articles of Confederation, provided that all acts of congress

"made by virtue and in pursuance of the powers hereby and by the Articles of Confederation vested in them, and all treaties made and ratified under the authority of the United States shall be the supreme law of the respective States so far forth as those acts or treaties shall relate to the said States or their Citizens, and that the judiciary of the

several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent the carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth the power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such acts, or an observance of such treaties."

The committee of the whole, in the resolutions which it drafted, approved of the method provided for in the Virginia Plan, but this was subsequently rejected, and a resolution, moved by Luther Martin and almost identical with the provision of the New Jersey Plan that has been quoted, was unanimously adopted. As phrased by the committee of style, the substance of this resolution appears as Article VI, clause 2, of the Constitution:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

Already, on a few occasions, state courts had held state statutes to be void on the ground that they were in conflict with state constitutions; we have

noticed the Rhode Island case of Trevett *v.* Weeden, where, it will be recalled, the court's decision had proved comforting to the creditor and propertied classes. Henceforth it would be the duty of state courts to declare null and void all acts of state legislatures if they were in conflict with this new "supreme law of the land," assuming, of course, that the question of conflict was raised in a case before the court. But suppose a state court sustained a state law whose constitutionality had been called in question—a not improbable contingency. The members of the convention were too wise to leave the ultimate safeguarding of the Constitution to state judges. There is another provision of the Constitution, found in Article III, Section 2, which ordains that the judicial power of the United States "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." It was the intention of the framers that in such a case as has been supposed, where rights claimed under the federal Constitution, laws of Congress or treaties, and alleged to have been violated by state law, were denied by a state court and the constitutionality of the state law in question sustained, an appeal should lie from the court of the state to the supreme court of the United States, to which, in last resort, the duty of protecting the Constitution from violation by the states would thus be entrusted. The Judiciary Act of 1789, passed by the first

congress under the new Constitution, many of whose members had sat in the Federal Convention, provided specifically for the taking of such appeals. More than forty years after the Constitution had gone into operation, when the state sovereignty which had been scotched by its adoption was again showing signs of vigor, Daniel Webster, in one of his most famous and powerful orations, declared that the two provisions of the Constitution that have been quoted were the key-stone of the federal arch. "With these it is a constitution; without them it is a confederacy."

Mention may be made of a few of the other clauses of the Constitution that were intended as specific remedies. Much had been said and written before the meeting of the convention about the defective organization of the federal government. The combination of legislative, executive and judicial powers in congress had been widely condemned and the need for separate executive and judicial departments repeatedly urged. On this question in general the members of the convention were in agreement, and all of the plans presented provided for separate departments; differences of opinion were confined to matters of detail. The first three articles of the Constitution provide for the establishment, organization and powers of the three departments—legislative, executive and judicial—into which the federal government was to be divided.

Much fault had been found, also, with the organ-

ization and procedure of the old congress—especially with the lack of a second chamber, the representation of states rather than of people, the method of voting by states, and the rule requiring the assent of nine states for the enactment of all important measures. All these objections were met by the Constitution. A bicameral congress was provided for; the lower house was to be composed of representatives chosen directly by the people and voting as individuals; and in the upper house, though the states were to be equally represented, members were to vote as individuals, not by states. Instead of requiring an extraordinary majority of congress for all important legislation, as under the Articles, a bare majority of both houses was made sufficient, except for overriding a veto of the executive, in which case a two-thirds vote was required.

The Articles of Confederation, it will be remembered, could be amended only with the consent of all the state legislatures, and such unanimity it had been found impossible to secure for a single amendment, though many had been proposed. Indeed, it was the practical impossibility of amending the Articles by the procedure for which they provided that had led to the meeting of the convention. The Constitution provides for a less difficult method of amendment. It fact it provides for four possible methods, but only one of these has been resorted to so far. By this, amendments are initiated by a two-thirds vote of both houses of

congress and become effective if ratified by the legislatures of three-fourths of the states.

Every American schoolboy has heard of the compromises of the Constitution, but what he has heard is not altogether correct. The traditional view is that there are three "great" compromises. These, as set forth in the textbooks, are: (1) a compromise between the large and the small states whereby states were to be represented according to population in the lower house of congress, which would give the advantage to the large states, and to have equal representation in the upper house, which would be favorable to the small states; (2) a compromise between the north and the south, whereby three-fifths of the slaves were to be counted in reckoning population for purposes of apportioning representation and direct taxes among the states; (3) a compromise between the north and the south that gave congress power to pass navigation acts, which was desired by the north, but prohibited interference by it with the foreign slave trade for a period of twenty years, which was in the interest of the south.

It will be noticed that of these three compromises two have to do with slavery, from which one would infer that in the framing of the Constitution slavery was a burning question. This, however, was not the case. Slavery was not the transcendent issue in 1787 that it came to be fifty years later. It was not yet a sectional question properly so called; and it is an interesting fact that the bitterest attack

on the slave trade in the convention was made by a Virginia delegate. The line of cleavage in the convention, as has been said, was between large and small states, not between north and south. For more than fifty years after the adoption of the Constitution, however, the people of the United States knew scarcely anything about how it had been framed. The rule of secrecy agreed to by the delegates at Philadelphia was surprisingly well observed. When the convention adjourned the official journal, together with other papers, were delivered to Washington and in 1796 were deposited by him in the department of state. In 1818 congress ordered them printed, and the work of editorship was undertaken by John Quincy Adams, then secretary of state. In 1819 there was published the *Journal, Acts and Proceedings of the Convention.* But the official journal proved very disappointing; it contained little more than a record of votes, and it threw no light upon the problems that confronted the convention or how they were met. But fortunately for history, Madison had appointed himself an unofficial reporter of the convention and with infinite pains had taken copious notes of the debates. He was unwilling to have them published during his lifetime, but when he died, in 1836, his papers were purchased by congress and his convention notes were published in 1840. They are our chief source of information for the drafting of the Constitution. Not until 1840, then, was it possible to know what had transpired in the Philadelphia

conclave. Now by that time slavery had become a great sectional issue, the great public question of the day; it had been the subject of memorable compromises between north and south, and compromise, as the only means of preserving the union, was in the air. No one can reflect much upon history without perceiving how the conditions of the day have always colored historical interpretation. Here is a striking example of it. Hildreth, in the third volume of his *History of the United States,* published in 1849, devoted one-third of his chapter on "The Formation of the Federal Constitution" to the slavery debates in the convention and represented slavery as the subject of two of the three "great" compromises of the Constitution. The anachronism is intelligible enough, but it has seriously misled Americans about the making of their Constitution.

If one examines Madison's *Notes* and the other records of the convention that are now accessible—with a minimum of bias, as a student of history should—he will find it necessary to revise time-honored notions about the compromises of the Constitution. The so-called "three-fifths" compromise turns out to be mythical. Counting a slave as equivalent to three-fifths of a person does, on the face of it, seem like a compromise between counting him at par and not counting him at all. But the three-fifths ratio is found in an amendment proposed to the Articles of Confederation in 1783, which had been ratified by eleven states before the Federal

Convention met. It appears in the New Jersey Plan in a provision for changing the basis of requisitions on the states from land value to population. There was nothing new about it, and it was not the result of compromise in the convention. The provisions that authorized congress to pass navigation acts and prevented it from abolishing the foreign slave trade for twenty years were reached through compromise, but they were not, and were not regarded as being, one of the "great" compromises of the Constitution.

The conventional view is most nearly correct with respect to the compromise on representation, though this too has been the subject of misinterpretation. Briefly, the compromise was reached in this way. The Virginia Plan proposed that the states should be represented *proportionally* in both houses of a two-house legislature; the New Jersey Plan proposed that they should be represented *equally* in a one-house legislature. The convention having voted in favor of a two-house legislature, the large states won a victory by carrying a resolution against equal representation in the lower house. Then the Connecticut delegates proposed equal representation in the upper house, their motion resulting in a tie vote. A special committee, made up of one member from each state, decidedly favorable in its personnel to the small-state party, recommended in effect, as parts of a single proposal, that in the lower house each state should be represented in proportion to population, counting

three-fifths of the slaves, and that in the upper house each should have an equal vote. After much debate these propositions were adopted by a vote of five states to four, with the small states of Connecticut, New Jersey, Delaware, Maryland and North Carolina in the affirmative, Pennsylvania, Virginia, South Carolina and Georgia in the negative, Massachusetts divided, and New York absent; Yates and Lansing had left the convention in disgust at the way things were going, and Hamilton was not in attendance at the time. The small states had been beaten on the question of representation in the lower house, but here they won a great though a narrow victory, which would have been impossible had the voting strength of the states in the convention been in proportion to their population. If was the most critical vote that was taken, for if it had gone the other way the small states would probably have withdrawn. How threatening the situation was may be inferred from the fact that it elicited from Franklin, who was not exactly orthodox in religion, a motion that divine guidance should be invoked and that the daily sessions of the convention should thereafter begin with prayer. A number of members objected to this on the ground that it might lead to "disagreeable animadversions" and create the impression that the convention was torn by dissensions; and there is a story that Hamilton observed that the convention was not in need of "foreign aid."

The most serious error that has been made about

the compromises of the Constitution, however, is the error of omission. If one reads the Constitution in the light of the debates in the convention, he will detect compromises on all sides. Professor Farrand, in his excellent volume, *The Framing of the Constitution,* goes so far as to call the Constitution a "bundle of compromises." Take, for example, Article III, Section 1: "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." What could seem more direct and artless? Yet this *may* register a compromise—a compromise between those who desired and those who were opposed to the establishment of such courts. Or take this: "The House of Representatives shall be composed of Members chosen every second year. . . ." Behind that provision lurks a compromise: some members of the convention wanted a one-year term, others, a three-year term; they compromised on two years.

The method finally agreed upon for choosing the president embodies an important compromise. It was recognized as such by Bancroft in his *History of the Constitution,* and in recent years a few historians have described it correctly; but it has not yet made its way into the textbooks, where the "three great compromises" still reign supreme. The problem of how to choose the president, while not so critical as the question of representation, was even more perplexing. It led to a compromise

between the large and the small states second in importance only to the great compromise over representation. Appointment by the federal legislature, by the state executives, direct election by the people, election by the state legislatures—each of these proposals found advocates and opponents. Wilson of Pennsylvania was the foremost of those who ventured to speak in favor of direct popular election. But the convention was suspicious and fearful of too much direct democracy, and its opinion was probably pretty well summed up by Mason of Virginia, who "conceived it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates." The question of the president's term of office also gave rise to much debate. Periods ranging from four to fifteen years were suggested, while advocates of tenure during good behavior were not wanting. Toward the close of the convention this whole question, together with certain others upon which agreement had not been reached, was referred to a special committee, which recommended the following method for electing the president: Each state should choose, in such manner as its legislature might direct, a number of electors equal to the total number of representatives and senators to which it was entitled. The electors were to meet in their

respective states and vote by ballot for two persons, at least one of whom should not be an inhabitant of their own state. This method of choosing the electors was favorable to the large states, since a large state would have more electors than a small state. But the vote of a majority of all the electors was made necessary to elect the president, and since it was expected that they would normally give their first ballots for citizens of their own states, it seemed probable that as a rule no one would receive the necessary number. In that event the senate was to choose the president from among the five persons who stood highest on the list, and in the senate each state would have equal representation. That is to say, and this was the essence of the compromise, the large states would have the advantage in the preliminary election, the small states in the final election. The plan recommended by the committee was adopted by the convention, except that the house of representatives was substituted for the senate as the body to make the eventual choice; but it was provided that when the house acted in this capacity each state should have one vote. The framers of the Constitution could not foresee that the development of national parties would destroy their carefully worked-out compromise. It was the party system that made possible the concentration of electoral votes on party candidates and also took from the electors the personal discretion in casting their ballots which the Fathers intended them to exercise. Only twice in American

history has the election of the president been thrown into the house of representatives: in 1801, when a majority of the electors gave a tie vote for Jefferson and Burr, and in 1825, when the electoral votes were so scattered that no candidate received a majority. In all other presidential elections the electoral vote has been decisive. This is the most striking example in our political system of what is so conspicuous in the English Constitution, the virtual nullification of legal powers by constitutional custom. The electors have still the legal power to vote for whomsoever they please, but in fact they must cast their ballots for their party candidates.

"The process of election," wrote Hamilton in *The Federalist* (No. 68), "affords a moral certainty that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue and the little acts of popularity may alone suffice to elevate a man to the first honours in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States."

The history of the presidency suggests that if Hamilton's opinion was correct, the method of

electing the president devised by the Fathers had merits over that which now prevails.

The Constitution is in truth full of compromises. But this fact should not be permitted to obscure another, which is perhaps of equal importance, the fact, namely, that on many questions the convention was in agreement and did not need to resort to compromise. In the past the Constitution has been discussed and interpreted mainly by students of constitutional and political history, of government and of law. They have been naturally interested primarily in such matters as the structure and powers of the federal government, its relations to the state governments, sovereignty, checks and balances, separation of powers, guarantees of private rights and immunities, and kindred subjects. But we live in an industrial age, and this fact is more and more influencing our interpretation of the past. The signs are many and plain that Clio has grown weary of that trite dictum of a distinguished votary that "history is past politics." No doubt the "economic interpretation" of history, passing at times into the doctrine of economic determinism, has been overworked in some cases, but its claim has been securely established and must be recognized by all sober-minded historical students. A beginning has been made in the study of the "economics" of the Constitution, with the result that the older historical treatment of its formation has come to seem almost pitifully unsatisfying. No longer can we accept the view of

John Fiske that the contest over the ratification of the Constitution was waged between the intelligent and the good on the one hand and the ignorant and the vicious on the other. No one can read much of the correspondence or pamphlet literature of the day without perceiving that powerful economic factors underlay the movement which resulted in the framing and adoption of the Constitution. Indeed these appear to have been the dynamic forces at work.

When the convention met, the people of the United States were divided into two factions or parties, with the division drawn along economic lines. The antagonism of rich and poor, creditor and debtor, merchant and small farmer, which was a commonplace of contemporary discussion, was a fact so portentous as to arouse in the minds of intelligent observers the most serious apprehensions for the stability of American institutions and the future of American society. In several states the advocates of paper money and debtor relief were in control of the legislatures. Radical measures in the interest of debtors, interfering with the rights of property and contract, had thoroughly alarmed the wealthier classes throughout the union and done much to convince them of the desirability of a change in the system of government. Madison is authority for the statement that "the mutability of the laws of the States" was the principal cause of the meeting of the Federal Convention. Of these laws he wrote:

"The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which occurred to our national character and interest from the inadequacy of the Confederation to its immediate objects."

In other states the party of paper money and debtor relief had been beaten at the polls. In all there were large and discontented minorities, defeated for the moment but cherishing a sense of injustice and oppression. At the very moment when the delegates to the convention were assembling, Massachusetts was just recovering from the convulsion of a desperate debtors' insurrection. Nevertheless this cleavage of American society along economic lines was scarcely at all reflected in the convention. The large majority of the delegates were lawyers, closely allied with the business interests of the country. The bondholder, the money lender, the merchant, the manufacturer, the land speculator, were generously represented at Philadelphia. The small farmer, the debtor, the advocate of cheap money, were conspicuous by their absence. The convention technically represented the whole American people, but it actually reflected the opinions of one of the two parties into which the people were at that crisis divided. The disputes in the convention, the occasions for compromise,

were many, but most of them arose over questions essentially political. If one approaches the work of the convention from the point of view of government and political science, he will naturally be impressed by its compromises. But on the great economic questions at issue between debtor and creditor, farmer and merchant, there was little need for compromise, for there was little disagreement among the delegates.

For the student of the Constitution as an economic document no clauses are more significant than those which give to congress the power to raise revenue by taxation, to borrow money on the credit of the United States and to regulate foreign and interstate commerce; that which declares that "all debts contracted and engagements entered into before the adoption of the Constitution shall be as valid against the United States under this Constitution, as under the Confederation"; and that which prohibits the emission of bills of credit and the impairment of the obligation of contract by the states. It is scarcely an exaggeration to say, with a recent student of the Constitution, that in these last two prohibitions "the economic history of the states between the Revolution and the adoption of the Constitution is compressed." Let us examine the evolution in the convention of these highly important economic clauses with a view to determining the nature of their origin.

Each of the "plans" presented in the convention proposed expressly or by implication to vest the

power to raise a revenue by taxation in the federal legislature. It is true that the Virginia Plan contained no positive provision on this subject, but it made a sweeping grant of legislative power to the proposed legislature. The sixth resolution provided

"that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."

In view of the general recognition of the breakdown of the former system of federal requisitions upon the states, it seems certain that it was the intention of the framers of the Virginia Plan to include in this clause the power of taxation. The New Jersey Plan was explicit. The second resolution provided that congress

"be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the United States, by Stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general post-office, to be applied to such federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same from time to time, to alter

and amend in such manner as they shall think proper."

Though the text of the plan presented by Charles Pinckney has not been preserved, it is practically certain that it, too, proposed to confer the power of taxation upon the federal legislature. The plan put before the convention by Hamilton authorized the national legislature "to pass all laws whatsoever subject to the negative" of the executive. The draft constitution reported to the convention by the committee of detail on August 6 contained this provision: "The Legislature of the United States shall have the power to levy and collect taxes, duties, imposts and excises." On August 16, this momentous clause was agreed to by the convention, Gerry alone voting in the negative. On September 4, the committee on unfinished parts recommended that the following words be added to the clause: "To pay the debts and provide for the common defence & general welfare of the U. S." This addition was agreed to unanimously. In the report of the committee of style, presented on September 13, this clause appeared as Article I, Section 8, Clause 1. Thus it is clear that this vital provision, so necessary for the restoration of public credit, was the result of agreement, not of compromise. Ezra Stiles, then president of Yale College, who had received some information of the proceedings of the convention from one of the delegates, recorded in his diary under date of Decem-

ber 21, 1787: "It appeared that they were pretty unanimous in the following ideas," and enumerated among them "that a certain Portion or Deg. of Dominion as to *Laws* and *Revenue* . . . was necessary to be ceded by individual States to the Authority of the National Council."

Turning to the regulation of commerce we find that all the plans advocated the vesting of this power in the federal legislature. It was clearly implied in the sixth resolution of the Virginia Plan, quoted above. The New Jersey Plan provided that in addition to the powers conferred upon Congress by the Articles of Confederation it should be authorized "to pass acts for the regulation of trade and commerce as well with foreign nations as with each other." The Pinckney Plan undoubtedly proposed to confer exclusive power over foreign and interstate trade upon the federal legislature. The Hamilton Plan, as already shown, contained, an unlimited grant of legislative power to the national government. The seventh article of the report of the committee of detail made provision that the legislature of the United States should have power "to regulate commerce with foreign nations, and among the several States"; and this was unanimously agreed to on August 16. It thus appears that there was nowhere in the convention any opposition to this grant of authority to the federal government. Indeed, it was the lack of this power which had created a state of affairs that was largely responsible for the meeting of the convention.

In its report, the committee of detail inserted a provision giving the legislature of the United States power "to borrow money, and emit bills on the credit of the United States." This clause had been taken directly from the Articles of Confederation, and there was no opposition in the convention to the first part of it, which was agreed to unanimously on August 16. But the convention as a whole was vehemently opposed to paper money. Some of the delegates were in favor of inserting in the Constitution a clause expressly prohibiting the emission of bills of credit by the federal legislature, notably Gouverneur Morris, Ellsworth and Wilson. Others were content merely to omit from the clause in the report the words "and emit bills." None of the members of the convention was in favor of the exercise of the power in question, and Langdon, the merchant prince of New Hampshire, went so far as to declare that he would rather reject the whole Constitution than accept it with those three words retained. It was pointed out that a positive prohibition would antagonize the friends of paper money throughout the country, and the convention was content merely to strike out the obnoxious words "and emit bills." Had there been any party in the convention in favor of the emission of paper money by the federal government, this action might be regarded as in the nature of a compromise between them and those members who desired a positive prohibition. But as this was not the case, the omission cannot be viewed as a compromise.

The interests of the public creditors naturally engaged the attention of a convention one of whose primary objects was to restore public credit and many of whose members were holders of public securities. The Virginia Plan declared that provision ought to be made for the fulfilment of all the engagements of the congress of the Confederation. On August 21, a committee which had been appointed to consider the assumption of the state debts by the federal government reported as follows:

"The Legislature of the United States shall have power to fulfill the engagements which have been entered into by Congress, and to discharge as well the debts of the United States as the debts incurred by the several States during the late war, for the common defence and general welfare."

Only the first part of this recommendation, that relating to the debts of the United States, need be considered here. It was debated on August 22, and a substitute amendment proposed by Gouverneur Morris was unanimously adopted. "The Legislature," it ran, "*shall* discharge the debts and fulfil the engagements of the United States." In the debate on this amendment, on August 25, objection was taken to the mandatory form in which the amendment was framed. "The use of the word *shall,*" said Mason, "will beget speculation and increase the pestilent practice of stock-jobbing." Doctor Johnson thought that no express provision

need be made on the subject, for, as he observed, "changing the government cannot change the obligation of the U. S. which devolves of course on the New Government." His sentiments seem to have been those of the great majority, who adopted, by vote of ten states to one, a substitute clause moved by Randolph, declaring that "all debts contracted and engagements entered into, by or under the authority of Congress, shall be as valid against the United States under this Constitution as under the Confederation." This was submitted to the committee of style which substituted the words "before the adoption of the Constitution" for "by or under the authority of Congress," and in this form it was finally accepted by the convention as Article VI, Clause 1, of the Constitution. This clause has been called a compromise. But since there was no sentiment worthy of mention in the convention in favor of repudiating or scaling down the existing federal debt, it cannot, it seems to me, properly be viewed in that light.

The Constitution expressly prohibits the states from emitting bills of credit or enacting laws impairing the obligation of contract. Neither prohibition appeared in any of the plans presented in the convention. In the report of the committee of detail, however, it was provided that no state, without the consent of the United States, should emit bills of credit. On August 28, when the convention in its consideration of the report had reached this clause, it was moved by Wilson and

seconded by Sherman to make this restriction absolute, instead of permitting the states to exercise this power if they received the consent of the United States. Sherman was an especially bitter opponent of fiat money. "Mr. Sherman," Madison tells us in his *Notes,* "thought this a favorable crisis for crushing paper money. If the consent of the Legislature could authorize emissions of it, the friends of paper money would make every exertion to get into the Legislature in order to license it." Gorham of Massachusetts, whose state had just passed through the throes of Shays's Rebellion, was fully aware of the strength of the paper-money party, and he thought that "an absolute prohibition of paper money would rouse the most desperate opposition from its partisans." Nevertheless, the convention was so resolute in its determination to destroy paper money that Wilson's motion, making the prohibition absolute, was adopted by vote of eight states to one, with one divided. King of Massachusetts now moved, in the words of the Ordinance of 1787, which had just been passed by the congress of the Confederation for the government of the Northwest Territory, that a prohibition be added restraining the states from interfering in private contracts. The provision of the Ordinance in question enacted that

"in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that

shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide,* and without fraud previously formed."

There was considerable discussion of King's motion. Even Gouverneur Morris, stalwart champion of the rights of property and contract though he was, thought this was going too far. "There are," he said, "a thousand laws relating to bringing actions—limitations of actions . . . which affect contracts—the Judicial power of the U. S. will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves." This view found some support in the convention, and King's motion was not voted on at that time.

The draft constitution referred to the committee of style provided as an absolute prohibition that no state should emit bills of credit. It contained, however, no provision respecting the impairment of the obligation of contracts by the states. Nevertheless, in the report of the committee of style this prohibition was included in Article I, Section 10, Clause 1. Additions having been made to this clause, it was adopted by the convention *without debate* on September 14. Chief credit for the work of the committee of style is by general consent given to Gouverneur Morris, its chairman, but in the inclusion of this particular restriction on the states it is impossible not to suspect the influence of King, who was one of its members.

James McHenry, one of Maryland's delegates to the convention, being later called upon to explain to the house of delegates of Maryland the principles upon which the Constitution had been based, informed that body that it had been argued that the power to emit bills of credit ought to be left to the states, but that "this was overruled by a vast majority as the best Security that could be given for the Public faith at home and the extension of commerce with Foreigners." Luther Martin, also of Maryland, was one of the very few members of the convention to say a good word for paper money, and the restraints placed by the Constitution upon the states in this and other matters formed one of his reasons for opposing its adoption. In his *Genuine Information* he wrote:

"By the tenth section every State is *prohibited from emitting bills of credit.* As it was reported by the committee of detail, the States were *only* prohibited from emitting them *without the consent of Congress;* but the convention was so *smitten* with the *paper money dread,* that they insisted the prohibition should be *absolute.*"

The provisions of the Constitution whose origins have been examined were undoubtedly of fundamental economic importance, and it has been shown that they were not the result of compromise, if by that word we mean adjustment of divergent views and interests, reached by mutual concession. The great struggle in the Federal Convention was be-

tween the representatives of the large and the small states, and to harmonize their conflicting political interests compromise had to be invoked; concessions had to be made by each party to secure a *modus vivendi* which would be reasonably satisfactory to both. But the battle was not fought on economic lines. Had the contests in the convention turned upon the questions at issue throughout the country between rich and poor, had Daniel Shays and Patrick Henry stood as leaders opposed to Madison and Gouverneur Morris, the struggle would surely have been no less bitter, but the compromises, it may be conjectured, would have been different.

Though the spirit that prevailed in the convention was intensely practical, though its members adhered closely to the business in hand, refraining from oratorical appeals to imagination and emotion which the presence of outsiders would no doubt have encouraged, the larger significance of what was done during those momentous summer weeks at Philadelphia was not wholly unperceived. "We are making Experiments in Politicks," observed Franklin. And Jefferson, watching with eager interest in Paris the oncoming of the French Revolution, wrote:

"The example of changing a constitution by assembling the wise men of the state, instead of assembling armies, will be worth as much to the world as the former examples we have given them."

Viewed in retrospect, from the sombre background of the late war and its aftermath, the making of the Constitution takes on heightened meaning. A comparison between the American states of 1787 and the European states of 1914 may seem fanciful, yet it is not wholly so. It is true that there were no such historic rivalries and deep-seated animosities between the sovereign states of America as there were between the sovereign states of Europe, but—and this goes to the root of the matter—there was state sovereignty in both cases. In the former, as in the latter, there were many causes of war-breeding friction. There were small states, suspicious and fearful of more powerful neighbors; there were commercial jealousies and tariff discriminations; there were vexatious boundary disputes; there were injuries inflicted by states upon citizens of other states. Indeed, actual hostilities between states, albeit on a petty scale, had taken place. When the Constitution was before the people a popular Federalist argument was that its rejection would lead to the dissolution of the Union and to chronic strife between the individual states or between such partial confederacies as might be formed. "To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same neighborhood," wrote Hamilton in *The Federalist,* "would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages." I am anxious not to do violence to facts or

to indulge in far-fetched historical interpretation. No member of the convention, so far as I know, professed himself a pacifist; the convention did not think of itself as a peace conference or of the document which it drafted as a covenant of a league of nations. Interstate warfare had not assumed such proportions as to seem one of the major evils to be remedied. But in their effort to form "a more perfect union" the framers of the Constitution removed to a considerable extent the causes of interstate strife, and they provided means for the settlement of future disputes. No one can tell how many were prevented from arising by the provisions in the Constitution which abolished interstate tariffs and forbade states to pass laws in violation of contract. We do know, however, that the supreme court, to which the Constitution gives jurisdiction in controversies between the states, has rendered decisions in more than eighty interstate controversies, controversies over boundaries, contracts, riparian rights and other questions. It has been suggested that the interstate jurisdiction of the supreme court might well serve as an example for internationalists to follow; and in this connection a letter written by Franklin to a friend in Europe, shortly after the close of the convention, deserves to be quoted:

"I send you enclos'd the propos'd new Federal Constitution for these States. I was engag'd 4 Months of the last Summer in the Convention that form'd it. It is now sent by Congress to the several

States for their Confirmation. If it succeeds, I do not see why you might not in Europe carry the Project of good Henry the 4th into Execution, by forming a Federal Union and One Grand Republick of all its different States & Kingdoms; by means of a like Convention; for we had many Interests to reconcile."

The history of the intervening years lends something of pathos to Franklin's benevolent hopes.

Though the Constitution was agreed to unanimously by the states represented in the convention, unanimity did not extend to individual members. Several delegates who disapproved of the Constitution withdrew from the convention before its close, and three dissentients who remained to the end, Randolph, Mason and Gerry, refused for various reasons to put their signatures to the new instrument. The last two actively opposed ratification, and all of them considered the Constitution seriously defective and favored a subsequent convention to improve it.

It contributes to an appreciation of the human aspects of the convention to learn from Washington's Diary that after the last session the members "adjourned to the City Tavern, dined together and took a cordial leave of each other." The precise nature of this leave-taking in which the Fathers indulged may be left to the imagination—it was at any rate unmarred by premonitions of an eighteenth amendment to the document they had just drafted.

The old congress, as we have seen, had had noth-

ing to do with the movement that had led to the meeting of the convention; it had merely sanctioned it at the eleventh hour, after several states had already appointed delegates. Nor did it now exert any influence. Its feebleness is shown by the fact that during the summer of 1787 its membership was reduced to six states—less than a quorum —"although," as its president despairingly wrote, "matters of the highest importance are pressing for a decision." The convention took matters into its own hands. It directed that the Constitution be laid before congress and advised that it be then submitted to conventions in the several states, chosen by the people thereof on the recommendation of their respective legislatures, for their approval. Ratification by popular conventions was preferred to ratification by state legislatures for several reasons. It was thought that it would give the new system a broader popular basis than the old had possessed; conventions, moreover, might prove less attached to state sovereignty than legislatures, and therefore less unwilling to accept an instrument diminishing the powers of the states; perhaps, too, it would be easier to secure adoption from single-chamber conventions than from double-chamber legislatures. In accordance with what was virtually the instruction given by the convention, congress, without expressing any opinion on the Constitution, voted unanimously to transmit it to the state legislatures, to be submitted by them to conventions in the states.

Here ends the first act of a constitutional revolution. The Federal Convention, called solely to propose amendments to the Articles of Confederation, which could legally become effective only if ratified by all the states, had disregarded its instructions. None of the delegates had been authorized to go further than was proposed in the report of the Annapolis Convention and the call issued by congress. In fact, the legislature of Delaware, in its act appointing the state's delegates to the Federal Convention, expressly stipulated that no amendment proposed to the Articles of Confederation should extend to the provision guaranteeing each state an equal vote in congress. Yet the convention not only drafted a wholly new plan of government, but—and this most decisively marks its revolutionary character—it inserted in the Constitution the provision that it should go into effect when ratified by nine states. Professor J. W. Burgess, in his *Political Science and Comparative Constitutional Law,* has forcefully pointed out that what the convention "actually did, stripped of all fiction and verbiage, was to assume constituent powers, ordain a constitution of government and liberty and demand a *plébiscite* thereon over the heads of all existing legally organized powers. Had Julius or Napoleon committed these acts, they would have been pronounced *coups d'état.*"

CHAPTER IV

THE ADOPTION OF THE CONSTITUTION

The submission of the Constitution to the states was the signal for the alignment of the American people into two opposing political factions. For the next year the adoption or rejection of the Constitution was the principal topic of political interest. Those who favored the new system called themselves Federalists and gave to their opponents the name of Antifederalists. It should be understood that the adoption of the Constitution was the work of a party. In every state it had friends and enemies, and unfortunately the party passions of the day have left their mark deeply engraved in the writings of American historians who have treated of this great epoch in our development. The formation of the Constitution has been dealt with almost exclusively from the Federalist point of view, and the judgments of partisans, inspired by the heat of conflict, have been perpetuated in what purports to be sober history. Thus the struggle has been generally represented as one between the good and the wise, on the one hand, and the foolish and the ignorant on the other. Federalist orators have been represented as wise and far-seeing patriots, Antifederalists as "demagogues." This view

is unhistorical and unfair. Neither party possessed a monopoly of wisdom and virtue or of folly and vice. Victory, it is true, crowned the efforts of the Federalists; and conjectures as to what would have followed their defeat lie outside the scope of history. But the time has surely come when we can be fair to the men of 1787, to whichever party they belonged. In some of the states the Antifederalists were in an undoubted majority, and, so far as can be determined, they constituted nearly if not quite one-half of the American people. We should be careful about indicting even half a nation.

Contemporary evidence makes it clear that the Federal and Antifederal parties were composed of groups based principally upon economic interests, though this fact has not in general received adequate recognition. A few quotations from contemporary writings will put the truth in a clear light. According to Hamilton, surveying the situation at the close of the convention, the new Constitution had in its favor, among other factors,

"the good will of the commercial interest throughout the states which will give all its efforts to the establishment of a government capable of regulating, protecting and extending the commerce of the Union . . . the good will of most men of property in the several states who wish a government of the Union able to protect them against domestic violence and the depredations which the democratic spirit is apt to make on property;—and who are besides anxious for the respectability of the nation

—the hopes of the creditors of the United States that a general government possessing the means of doing it will pay the debt of the Union. A strong belief in the people at large of the insufficiency of the present confederation to preserve the existence of the Union and of the necessity of the Union to their safety and prosperity. . . . Against its success is to be put . . . the influence of many *inconsiderable* men in possession of considerable offices under the state governments who will fear a diminution of their consequence, power and emolument by the establishment of the general government and who can hope for nothing there—the influence of some *considerable* men in office possessed of talents and popularity who partly from the same motives and partly from a desire of *playing a part* in a convulsion for their own aggrandisement will oppose the quiet adoption of the new government— . . . add to these causes the disinclination of the people to taxes and of course to a strong government—the opposition of all men much in debt who will not wish to see a government established one object of which is to restrain the means of cheating Creditors—the democratical jealousy of the people which may be alarmed at the appearance of institutions that may seem calculated to place the power of the community in few hands and to raise a few individuals to stations of great preeminence."

A correspondent, writing to Washington from New Haven at about the same time, said:

"All the different Classes in the liberal professions will be in favor of the proposed Constitu-

tion. The Clergy, Lawyers, Physicians & Merchants will have considerable influence on Society. Nor will the Officers of the late Army be backward in expressing their approbation."

"The new constitution," General Knox informed Washington early in October, 1787, "is received with great joy by all the commercial part of the community." Madison wrote to Jefferson in December, 1787, that in New England "the men of letters, the principal Officers of Government, the judges and lawyers and clergy and men of property furnish only here and there an adversary."

In January, 1788, Rufus King, a member of the Massachusetts ratifying convention, wrote to Madison:

"An apprehension that the liberties of the people are in danger, and a distrust of men of property or Education have a more powerful Effect upon the minds of our Opponents than any Specific Objections against the constitution."

And shortly after this he said that the opposition arose chiefly

"from an opinion that is immovable, that some injury is plotted against them—that the system is the production of the rich and ambitious, that they discover its operations and that the consequences will be the establishment of two orders in the Society, one comprehending the opulent and great, the other the poor and illiterate. The extraor-

dinary Union in favor of the Constitution in this State of the Wealthy and sensible part of it is in confirmation of these opinions and every exertion hitherto made to eradicate it, has been in vain."

In February, 1788, Madison wrote that in New York "the weight of abilities and of property is on the side of the Constitution."

In June, 1788, a citizen of New Hampshire assured Washington that three-fourths of the property and a larger proportion of the ability of his state were friendly to the Constitution. He added:

"The opposition here (as has generally been the case) was composed of men who were involved in debt, and of consequence would be averse to any government which was likely to abolish their tender Laws and cut off every hope of accomplishing their favorite plan of introducing a paper currency."

An examination of the make-up of the state ratifying conventions shows that in the main the commercial, financial and maritime sections sent Federalist delegates, while the distinctively rural communities sent Antifederalists. In a monograph entitled *The Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution,* one of the most significant contributions that has been made to the social and economic history of the United States, Dr. O. G. Libby, on the basis of a careful study of the votes of the delegates in the state ratifying conventions, supplemented

and corrected as far as possible by other data, shows the areas that supported and those that opposed the Constitution. His conclusion is that

"the Constitution was carried in the original thirteen states by the influence of those classes along the great highways of commerce, the sea-coast, the Connecticut river, the Shenandoah valley and the Ohio river; and in proportion as the material interests along these arteries of intercourse were advanced and strengthened, the Constitution was most readily received and most heartily supported."

Of course, other than purely economic influences operated on both sides. The patriotic desire to establish a strong government under which the United States could play a dignified part in international affairs, a larger conception of nationality and a perception of the possibilities awaiting the United States if welded together by a vigorous general government, and a fear that only by adopting the Constitution could the union be preserved—all these were factors favoring the proposed system. On the other hand, there was a wide-spread feeling that the new Constitution, which contained no bill of rights, would prove injurious to liberty; persons whose interests were centered in their localities and who were devoted to state sovereignty were naturally loath to see the states shorn of any of their powers; men who deprecated a radical change of government condemned the whole movement for

the Constitution as illegal—as, strictly speaking, it was. Sectional elements, too, entered into the complex of influences. In the south, especially in Virginia and its western counties, there was widespread suspicion of New England and the middle states; the desire of the north to win commercial advantages for itself at the expense of the southwest was still fresh in men's minds, and the fear was entertained that the adoption of the Constitution would make easier the aggrandizement of the commercial section at the expense of the agricultural. And then, too, the politicians on both sides, made great use of the Constitution as a political issue with which to enlist support and build up their own power. A good deal of emphasis should be placed upon the canny remark of Franklin at the time that the United States was a "Nation of Politicians."

The Federalists unquestionably enjoyed great advantages over their opponents in the struggle. In most of the states the majority of the natural leaders of public opinion were on their side. The New England clergy, the professional classes, the newspaper proprietors, the financial and mercantile interests, the great planters of the south, and men of superior education in general, were supporters of the Constitution. The name of Washington lent it powerful aid not only in Virginia but throughout the country. The Federalists conducted a strenuous "campaign of education." Handbills composed by ardent friends of the Constitution

were circulated broadcast throughout the remote communities. Articles dwelling upon the advantages to be expected from the adoption of the Constitution were printed and reprinted in the local newspapers, and appeals were freely made to local and class interests. Of course, the Antifederalists were not idle. Their orators and pamphleteers pointed out some real and many imaginary defects in the Constitution. But in this campaign of education the advantage lay with the Federalists, who were better organized, who had more money to spend, whose leaders in general came from the upper classes, and whose arguments were based upon wider knowledge. Of the mass of literature begotten of this crisis little is read nowadays except by historical students or antiquarians. One of these partisan productions, however, has earned the reputation of a truly great treatise in political science. This was a series of 85 essays, printed in various New York newspapers over the signature of "Publius" and now famous as *The Federalist.* Most of the papers were written by Hamilton and Madison, and a few were from the pen of Jay. The purpose of the writers was to win support for the Constitution in New York, but the essays were widely reprinted and at once attracted attention. Washington wrote that they would "merit the Notice of Posterity," and Jefferson, then United States minister in Paris, went so far as to say that they constituted "the best commentary on the principles of government which ever was written." It

has remained the most authoritative, as it was the earliest, commentary on the Constitution.

Of the greatest advantage to the Federalists was the argument that rejection of the Constitution would result in disunion and disaster. Washington's correspondence is full of assertions that the defeat of the Constitution would lead to anarchy. "I have for some time been persuaded," wrote Madison in February, 1788, "that the question on which the proposed Constitution must turn, is the simple one whether the Union shall or shall not be continued." This was a most telling argument, and the skillful Federalists politicians made full use of it.

And the Federalists were united in support of a constructive program. From New Hampshire to Georgia they stood on the same platform. It should be remarked in this connection that the meaning of the words "federal" and "federalist" had undergone a metamorphosis. In the early days of the convention "federal" had been applied to the proposals of the small-state party, which opposed the abandonment of the Articles of Confederation and objected to the Virginia Plan on the ground that it was not "federal." On June 14, Paterson of New Jersey said that "it was the wish of several deputations, particularly that of N. Jersey, that further time might be allowed them to contemplate the plan reported from the Committee of the Whole, and to digest one purely federal, and contradistinguished from the reported plan," and the New Jersey Plan,

which he presented on the next day, was offered as a "federal" plan, in contrast with the "national" Virginia Plan. After the New Jersey Plan had been rejected, the large-state party, in a spirit of conciliation, agreed to drop the word "national," and eventually all supporters of the Constitution came to call themselves "Federalists." None of the Federalist leaders claimed perfection for the Constitution, but they pointed out that it could be improved by amendment after adoption. The Anti-federalists, on the other hand, with no constructive plan of their own to offer, were united only in opposing the Constitution. The very name "Anti-federalist" was a liability, for it suggested mere opposition and obstruction.

"Events have demonstrated," said Madison, "that no coalition can ever take place in favor of a new Plan among the adversaries to the proposed one. The grounds of objection among the non-signing members of the Convention are by no means the same. The disapproving members who were absent but who have since published their objections differ irreconcilably from each of them. The writers against the Constitution are as little agreed with one another; and the principles which have been disclosed by the several minorities where the Constitution has not been unanimously adopted, are as heterogeneous as can be imagined."

In all of the states except Rhode Island the legislatures called conventions to pass upon the new Constitution. Those qualified by state law to

vote for members of the lower house of the state legislature were permitted to vote for delegates to the conventions, but at this time, as we have seen, the suffrage was restricted in all of the states, in most cases by a freehold qualification. The legislature of New York, however, made an exception and allowed all adult males to vote for delegates to the convention. Thus in every state but New York an appreciable proportion of the adult male population was not represented in the ratifying conventions, precisely what proportion cannot be ascertained. In spite of the momentous character of the decision to be made by the conventions it appears that in all of the states indifference or ignorance kept large numbers of qualified voters from exercising their privilege. It has been conjectured that not more than 160,000 persons, or about five per cent of the total population of the United States, expressed any opinion on the new instrument of government.

The great compromise of the Constitution had won support for it in the small states, and it was Delaware that first ratified, on December 7, 1787. There was no serious opposition in the state, and the vote of the convention was unanimous.

In Pennsylvania the state legislature was in session in Philadelphia when the Federal Convention adjourned. Without waiting for action by congress, which was then sitting in New York, the Federalists in the Pennsylvania assembly voted to call a state convention, despite a protest by a

minority at this unseemly haste. To prevent further action nineteen members of the minority by agreement absented themselves from the sessions of the assembly, leaving less than a quorum in attendance. Efforts by the majority to induce the absentees to return failed, and the assembly was unable to pass legislation necessary to provide for the election of delegates to the state convention. Presently, the resolution of congress recommending the submission of the Constitution to a convention was received. A Federalist mob now intervened and dragged two of the absentees, the worse for rough handling, to the assembly room. One of the unfortunates tried to escape from his seat, but friends of the Constitution barred his exit. Thanks to these applications of "direct action," the assembly, now having a quorum, proceded to provide for the election of delegates to meet in convention at Philadelphia. Sixteen members of the minority issued an address to the people, which recited that violence had been used to secure a quorum, declared that the Federal Convention had had no authority to frame a new Constitution, and called attention, among other things, to the facts that the proposed Constitution contained no bill of rights, no provision for annual elections and no guarantee against standing armies in time of peace. This at once elicited rejoinders from the Federalists, and the contest over the Constitution in Pennsylvania was soon in full swing. The convention met on November 21. The delegates from Philadelphia and

the other commercial communities were strongly Federalist, while those from the purely agricultural areas, and especially the western counties, were as decidedly Antifederalist. The Antifederalist delegates proposed several reasonable amendments and attempted to secure an adjournment in order to give time for more deliberate consideration, but they were voted down. The Federalist majority was determined to reap the full advantage of its present strength, and the Constitution was ratified on December 12 by a vote of 46 to 23. In an address to the people 21 members of the minority protested bitterly against the haste and violence by which ratification had been secured.

"The convention," they declared, "was called by a legislature made up in part of members who had been dragged to their seats and kept there against their wills, and so early a day was set for the election of delegates that many a voter did not know of it until it was passed. . . . Of the seventy thousand freemen entitled to vote but thirteen thousand voted."

The discomfited Antifederalists of western Pennsylvania continued to cherish a hostility toward the Constitution that flared up in rebellion in 1794.

The New Jersey convention spent only one week in debate and ratified the Constitution unanimously on December 18. On January 2, 1788, Georgia followed suit with a unanimous ratification, and

on January 9 Connecticut gave its approval by a vote of 128 to 40.

It was in the large and important state of Massachusetts that the Federalist met their first check. In no commonwealth were the people more politically-minded than in Massachusetts—the nursery of that institution of direct democracy, the New England town meeting—and in none was there more wide-spread distrust and suspicion of delegated power. Nowhere, furthermore, was there a sharper division between the mercantile and financial interests, on the one side, and agrarianism, on the other. The embers of Shays's Rebellion were still smoldering. In a letter written to Washington in January, 1788, General Knox thus clearly described the situation in Massachusetts.

"There are three parties existing in that state at present, differing in their numbers and greatly differing in their wealth and talents.

"The 1st. is the commercial part of the state to which are added all the men of considerable property, the clergy, the lawyers—including all the judges of all the courts, and all the officers of the late army, and also the neighborhood of all the great towns—its numbers may include 3/7ths of the state. This party are for vigorous government, perhaps many of them would have been still more pleased with the new Constitution had it been more analogous to the British Constitution.

"The 2d. party are the eastern part of the state lying beyond New Hampshire forming the province

of Main—This party are chiefly looking towards the erection of a new state and the majority of them will adopt or reject the new Constitution as it may facilitate or retard their designs—this party 2/7ths.

"The 3d. party are the Insurgents or their favorers, the great majority of whom are for an annihilation of debts, public and private, and therefore they will not approve the new Constitution—this party 2/7ths."

When the Constitution was first received in Massachusetts, it was greeted with general approval, but the enthusiastic support given it by merchants, money-lenders, lawyers and clergymen —the "aristocracy"—aroused the suspicions of the farmers and mechanics—the "democracy." The Massachusetts convention met on January 9, 1788, and it is the opinion of Professor S. B. Harding, who has made a careful study of ratification in Massachusetts, that if a vote had been taken at once the Constitution would have been defeated overwhelmingly. The Federalist leaders in the convention, however, were far more skillful than their opponents. Among them were Rufus King, Gorham and Strong, all of whom had been members of the Federal Convention, ex-Governor Bowdoin, the champion of law and order in Shays's Rebellion, and General Lincoln, who had routed the Shaysites. There were two politicians in the state whose attitude toward the Constitution was of especial importance on account of their great personal influence and following. These were Samuel

Adams, the old Revolutionary patriot, the "man of town meeting," as he has been called, and John Hancock, also of Revolutionary fame and at the time governor of the commonwealth. At first Adams was opposed to the Constitution, and Hancock was non-committal. The astute Federalist leaders, knowing how sensitive both men were to the opinion of the masses, instigated the mechanics of Boston to hold a meeting just before the opening of the state convention, at which resolutions warmly endorsing the Constitution were carried. This fact undoubtedly had great influence with Adams, who never spoke against any feature of the Constitution in the convention. For several weeks, however, Hancock, though elected chairman of the convention, absented himself from its sessions. Gout was the reason alleged for his non-attendance, but some who knew the governor well diagnosed the malady as political in character. He did not take his place in the convention until the Federalists had won him to a plan of ratifying the Constitution and at the same time proposing amendments to it by pledging him their support in the coming gubernatorial election in Massachusetts and holding before him the prospect of becoming the first vice-president, perhaps the first president, of the United States. The plan of ratifying with amendments won over some of the Anti-federalists in the convention, though there was no assurance that the amendments to be proposed would ever be adopted. Seeing the tide turning

against them, the Antifederalists tried to adjourn, believing that public discussion of the Constitution and the proposed amendments would be favorable to them, but their attempt failed, and on February 7 the Constitution was ratified by the close vote of 187-168. Of the nine amendments recommended the most important was one explicitly declaring that "all powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised." The precedent set by Massachusetts of recommending amendments was followed by several other states and materially facilitated the process of ratification. The economic basis of the contest in Massachusetts is clearly indicated by the fact that the four coast counties, comprising the commercial section of the state, gave 100 votes in the convention for the Constitution and only 19 against it, while the interior counties, like Worcester and Berkshire, gave majorities as strongly Antifederalist.

The Maryland convention met at Annapolis on April 21, 1788. Though the opponents of the Constitution were ably led by Luther Martin, the large Federalist majority resolved on speedy action, believing that this would have a good effect on the states which had not yet ratified, especially Virginia, and refused to permit votes to be taken on the separate parts of the Constitution. Within a week the instrument was ratified by a vote of 63 to 11. The Virginia Federalists were jubilant over Maryland's action.

In South Carolina a good deal of opposition to the Constitution was manifested in the legislature, but the convention was strongly Federalist and ratified by a large majority on May 23. Eight states had now come under the "new roof," and according to the Constitution itself only one more ratification was needed to insure the inauguration of the new system.

The Federalists throughout the country anticipated an easy victory in New Hampshire. Sullivan, the governor of the state, and Langdon, its wealthiest and most influential citizen, were, in the words of a contemporary, "uniting their whole interest in favor of the Constitution." But when the delegates to the convention assembled at Exeter on February 13, 1788, the Federalists found to their dismay that a very large proportion of them had received positive instructions from their constituents to vote against the Constitution. Several of the delegates so instructed were "converted" to the Federalist side but dared not violate their instructions. In the words of a contemporary,

"It was therefore thought advisable by the Gentlemen in favour, and those Converted, that they had best adjourn and Return to their Constituents, and give up their Instructions, and if they would not Consent for them to act according to the dictates of their own reason, they would resign & they may choose new Delegates to meet in June at Exeter. It is thought this measure will have its desired effect, for before June the Illiberal

and Ignorant will be brought in to what is right and Just."

Thus the New Hampshire Federalists saved themselves from defeat only by persuading some of the "converted" Antifederalists to disregard their instructions and concur in a policy of delay. Active influences must have been at work in the state during the next few months, for when the convention met again in June the Constitution was adopted after a debate of only four days by a vote of 57 to 47.

Nine states had now ratified the new Constitution, but the important commonwealths of Virginia and New York were still to be heard from. In Virginia the contest was bitter and close. The Antifederalists enjoyed unusually good leadership, for their forces were marshalled by Patrick Henry, Richard Henry Lee and George Mason. Without the weight of Washington's name the Federalists would probably have been defeated, though they were ably led in the convention by Madison and the young John Marshall, the future chief-justice of the supreme court. Jefferson, then United States minister in France, was watching with intense interest the course of events in America, of which he was informed by correspondents, and his views were a factor of importance in Virginia. At first Jefferson was afraid of the Constitution. He thought that all the good in it might have been secured by a few amendments to the Articles of

Confederation. Always apprehensive of strong government, he did not share the Federalist opinion of the utter insufficiency of the Articles of Confederation. He feared that the proposed government would be too "energetic" and believed that the Federalists had been unduly alarmed by such experiences as Shays's Rebellion. Jefferson carried Locke's theory of government to the limit of logic. He not only argued that the original social compact should be renewed periodically, since he held that one generation had no right to bind its successors, but he looked upon occasional rebellion as the manifestation of a healthy spirit of liberty. Since the thirteen United States had undergone only one insurrection in eleven years he calculated an average for each state of only one in a century and a half, and gravely observed: "No country should be so long without one." Upon reflection, however, he came to the conclusion that the wisest course would be for nine states to ratify the Constitution (which would insure its adoption) and for the rest to reject it until essential amendments had been secured. In particular, he deemed a bill of rights, guaranteeing individual liberty, a necessary safeguard against tyranny, and he was also afraid that the re-eligibility of the president would make possible the establishment of a virtual monarchy. But his opinion grew more favourable as a result of additional reflection and correspondence, and he approved of the Massachusetts plan of ratifying and proposing amendments.

Virginia was divided into several clearly marked areas. The eastern or "tidewater" section was strongly in favor of the Constitution. Here were located the larger towns and the estates of the great planters. Farther west, extending to the Blue Ridge, the chief element in the population were the small farmers, who were as strongly opposed to the Constitution. In the Shenandoah Valley, peopled principally by Scotch-Irish and Germans from Pennsylvania, sentiment appears to have been overwhelmingly Federalist, but in the Kentucky district the Antifederalists were in a large majority. On June 25, after stirring and exciting debates in the convention, the Constitution was ratified by the close margin of 89 to 79. The Massachusetts precedent was followed, and a series of amendments were recommended. Ten states had now ratified, and the Federalists throughout the country celebrated the Fourth of July, 1788, both as the anniversary of Independence and as the birth of the new Constitution.

The anxiety of the friends of the Constitution, however, was not yet entirely allayed. True, the requisite number of states had ratified, but New York had not yet given its decision, and if that commonwealth held aloof, it was doubtful if the new system could be successfully inaugurated. The situation in New York gave ground for the gravest apprehension.

The city of New York and the surrounding territory, the commercial section of the state, was

strongly Federalist, but the interior was almost solidly opposed to the Constitution, and Governor Clinton's powerful political machine was working hard to secure its defeat. The publication of a letter written by Yates and Lansing to the governor, stating that they had withdrawn from the Federal Convention because it had violated its instructions and exceeded its authority, had no little effect. Scarcely had the Constitution been published when Clinton, over the *nomme de guerre* of "Cato," began a series of articles, which elicited replies from Hamilton, disguised as "Caesar." It was "Cato's" attacks on the Constitution that induced Hamilton, Madison and Jay to collaborate in the publication of the series of papers that became famous as *The Federalist*. Many other lesser champions entered the lists, and the war of words became spirited. Governor Clinton, without comment, submitted the Constitution with accompanying papers to the state legislature, which met in January, 1788, and early in February the legislature called a convention. When it was clear that the elections had gone against the Federalists there was some talk that New York city and the neighboring region might separate from the rest of the state and cast in its lot with the new union, if the New York convention refused to ratify.

The convention met in June at Poughkeepsie, with the Antifederalists in a majority of two-thirds. The commercial counties—New York, Kings, Queens, Richmond and Westchester—sent Feder-

alist delegations; Albany, Clinton, Columbia, Montgomery, Ulster and Washington sent Antifederalists; Dutchess and Suffolk were divided. For more than a month the Constitution was debated, clause by clause. The Federalists were well led by Hamilton, Jay and Robert R. Livingston, while Melancton Smith, Lansing and Yates, supported by Clinton, marshalled the opposition. News that New Hampshire, the ninth state, had ratified encouraged the Federalists, who argued that the question now was clearly one of union or disunion; and even more helpful to them was the news of Virginia's ratification. The ranks of the opposition were wavering when Lansing introduced a series of explanatory, recommendatory and conditional amendments. The Federalists were prepared to accept amendments, so long as ratification was not much contingent on their adoption, but contingent ratification, they held, was not ratification in the sense in which that word was used in the Constitution, and would not make the state a member of the new Union. Madison, then in New York, gave it as his opinion that the Constitution required ratification "in toto and forever," adding, "It has been so adopted by the other states." A motion to authorize the state to withdraw from the Union if amendments were not made within a certain period was defeated, and on July 26 the convention ratified by a vote of 30 to 27. The principal credit for this achievement is correctly given to Hamilton. The convention, however, not only

recommended a number of amendments and directed the representatives of the state in congress to use all reasonable means to secure their adoption, but by unanimous vote it issued a circular letter to the other states urging that a second general convention be called to consider the numerous amendments proposed by the various state conventions. Some of the Federalists were all the more willing to make this apparent concession to their opponents because they believed that the agitation for a second convention would evaporate in talk; and events proved their surmise correct.

Two states failed to adopt the Constitution until after the new government had gone into operation. In Rhode Island, where the government was dominated by the paper money party, a unique course of action was pursued. Copies of the Constitution were distributed among the towns of the state, to give the people full opportunity to study it, and the legislature voted to submit the question of ratification directly to the people in their town meetings. When the vote was taken, late in March, 1788, it was seen that only a small part of the qualified voters had taken the trouble to register an opinion. 237 votes were cast in favor of the Constitution and 2708 against it. The Federalists, who objected to this method of ascertaining the will of the people of the state, seem to have generally refrained from voting. In Newport only one vote was cast in favor of the Constitution. In North

Carolina the Federalists had expected a victory, but the convention turned out to be strongly Antifederalist and adjourned without having either ratified or rejected the Constitution. A contemporary probably stated the case correctly when he said: "Whatever ostensible reasons may be offered by these two States for the rejection of this Constitution, from what I can learn the true one is the inhibition of paper money . . ."

In September, 1788, congress took action necessary for starting the new government. The first Wednesday in January was designated as the day for the choice by the states of presidential electors, the first Wednesday in February for the election of the president and the first Wednesday in March for the inauguration of the new government. After prolonged debates in congress over the location of the new government, it was decided to inaugurate it in New York City.

The ratification of the Constitution marked the consummation of the revolution which the Federal Convention had begun. Supporters of the Constitution attempted at the time and have attempted since to give it the color of legality, but their arguments are not convincing. Candor must recognize that the establishment of the Constitution can be justified only by the right of a people to change their form of government without legal authority, the right which had been invoked in 1776, the right of revolution.

A good deal has been written on the origin and sources of the Constitution, and while much of it is fanciful, some of it preposterous, the subject itself cannot be passed over by anyone who is viewing the Constitution in its historical evolution. The history of the United States under the Articles of Confederation explains why there was a widespread desire for change, but it cannot of itself explain the precise form that change took. Discontent with the feebleness of executive authority under the Confederation, for instance, does not account fully for the office of president. A well-known historian has observed that in all institutional history there are two sets of causes or antecedents. These, in his words, are "the general cause, or the prevailing condition of things in the society of the time, which renders a new institution necessary," and "the old institution, on which the prevailing cause seizes, and which it transforms into a new one." It may be objected to this mode of expression that it is an attempt to explain man's institutions without reference to man. "Causes" do not "seize" on institutions; rather, men make institutions, by conscious contrivance or by a process of unconscious adaptation. But, at any rate, men live in an environment of old institutions, ideas and traditions from which the boldest innovator cannot escape. Institutions are never made brand new, without precedent, in historical isolation.

It has been argued that the Constitution was

copied from the contemporary Constitution of England. This view is urged by Mr. C. E. Stevens, who tells us, in a book entitled *The Sources of the Constitution,* that Blackstone's analysis of the English system of government was followed by the framers of the American Constitution with the utmost fidelity. A more distinguished authority, Sir Henry Maine, speaks to the same effect:

"The Constitution of the United States," he says, "is a modified version of the British Constitution, but the British Constitution which served as its original was that which was in existence between 1760 and 1787. The modifications introduced were those, and only those, which were suggested by the new circumstances of the American colonies, now become independent."

Lord Bryce does not go as far as Mr. Stevens and Sir Henry Maine, but in considering the materials which the Federal Convention had at their command, he mentions first the English Constitution.

"The men of the Convention," he writes, "had the experience of the English Constitution. That Constitution, very different then from what it is now, was even then not quite what they thought it. Their view was tinged not only by recollections of the influence exerted by King George the Third, an influence due to transitory causes, but which made them overrate its monarchical element, but also by the presentation of it which they found in the work of Mr. Justice Blackstone. He, as was natural

in a lawyer and a man of letters, described rather its theory than its practice, and its theory was many years behind its practice. The powers and functions of the cabinet, the overmastering force of the House of Commons, the intimate connection between legislation and administration, these which are to us now the main characteristics of the English Constitution were still far from fully developed. But in other points of fundamental importance they appreciated and turned to excellent account its spirit and methods."

Now it is undoubtedly true that in some of its provisions our Constitution resembles the English Constitution as it was in the year 1787. Take, for illustration, the guarantee of freedom of speech for members of congress. This recalls a famous provision of the English Bill of Rights of 1689. But it turns out that a similar guarantee was contained in the Articles of Confederation and in the Maryland constitution of 1776. Again, it has often been said that the office of president was modelled on the English kingship. This assertion, which was made by the Antifederalists in the days of ratification, was answered by Hamilton in Number 69 of *The Federalist,* in which he showed the many dissimilarities between the presidency and the crown and the numerous and striking resemblances between it and the office of governor in the states. If a provision of the Constitution is similar to one found in the Articles of Confederation or in a state constitution, and also resembles some law or custom

of the English Constitution, it is surely far-fetched to infer that the borrowing was from what was remote, rather than from what was at hand and known through intimate experience. An examination of the debates in the Federal Convention forces us to reject the view that the American Constitution was to any extent a copy of the contemporary English Constitution. In the convention Hamilton was the warmest champion of the English government, but he, as we have seen, had little influence in the drafting of the Constitution. Other members of the convention admired the English system of government, but they did not think that they were copying it, or indeed that it could be introduced in the United States. "I revere the theory of the British Government," said the Scotchman, James Wilson, "but we can't adopt it." And Pinckney remarked: "I will confess that I believe it [the English Constitution] to be the best constitution in existence; but at the same time I am confident it is one that will not or cannot be introduced into this country, for many centuries."

In a very sane little book entitled *The Evolution of the Constitution of the United States,* Mr. Sydney George Fisher has this to say of the theory that our Constitution was patterned after the British.

"After reading the assertions of learned writers that our Constitution was modelled on the British government as it existed in 1787, I have sometimes

turned to the words of the Constitution to see the resemblance, and have never been able to find it. . . . I recommend to those who believe in the British model theory to adopt this simple plan: Read our Constitution, sentence by sentence, from beginning to end, and see how many sentences they can trace to an origin in the British government.

"I do not deny that in a certain sense it is all English. In fact I have taken considerable pains to show how our Constitution was developed by English colonists out of the forms of English trading corporations through the English colonial charters. Nor will any one deny that our language, laws, and many of our customs and modes of thought, as well as our characteristic instincts and feelings, are of English origin. . . . But all this is very different from the dogma some wish to establish, that our Constitution was taken or copied from or suggested by the forms of the British government as it existed in 1787. In my opinion, there was no copying, because we were so thoroughly Anglo-Saxon in our instincts and feelings that imitation was excluded. We acted after the manner of our race, and built, stone by stone, out of the natural material and conditions round us."

Far more fantastic than the British model theory is the notion that what is of most value in the Constitution, as indeed in American institutions generally, is of Dutch origin. This idea would not deserve notice if it had not been gravely urged in a book that has some appearance of scholarship and has gone through several editions, *The Puritan*

in Holland, England and America by Mr. Douglas Campbell. The author's extravagant claims show how far historical fancy may wander when, unrestrained by common sense, it picks and chooses evidence to support a preconceived theory. In the records of the Federal Convention there are some references to the Netherlands, but when Dutch institutions were mentioned it was rather for the sake of warning against than of copying them. What the Fathers thought of the Netherlands is fairly represented by Madison in *The Federalist:*

"Such," he wrote, "is the nature of the celebrated Belgic confederacy, as delineated on parchment. What are the characters which practice has stamped upon it? Imbecility in the government; discord among the provinces; foreign influence and indignities; a precarious existence in peace, and peculiar calamities from war."

We may leave the theory of the foreign origin of the Constitution with another quotation from Mr. Fisher:

"If I find on American soil the footprints of a man, and wish to discover whence he came, I surely ought not to assume at once that he is a foreigner and take the next steamer for England and Holland to see if I can find footprints over there that are like his. It would be better, it seems to me, to start backward on his trail from the very spot where I find it; for it may be that he is a native, and I may be able to follow his tracks for hundreds

of miles in this country, and, when I come to his house, find that he and his ancestors have been living there for many generations. In any event, I should follow back his track until it ends on the sea-shore, and after that search for him in other countries."

We have next to notice the theory that the Constitution was the product of an individual mind. This has inspired a number of enthusiasts of the hero-worship cult. Extravagant claims have been made in behalf of Hamilton and Charles Pinckney, but the most astonishing of all the personal-invention theories, is that which was elaborated in a volume by the late Hannis Taylor, published some years ago and entitled *The Origin and Growth of the American Constitution*. On the strength of the pamphlet by Pelatiah Webster, previously referred to, Mr. Taylor hailed Webster as the "architect" of the Constitution and reprinted his tract as "the first draft of the existing Constitution of the United States." Webster, according to his eulogist, was the first to propose a convention to reform the Confederation, and his tract was the origin of all the plans that were presented in the Federal Convention except the New Jersey Plan, which was offered merely as proposals for amendments to the Articles of Confederation. Mr. Taylor had achieved a reputation in law and diplomacy and was favorably known as the author of a work on the English Constitution. His book, therefore,

attracted considerable attention, though critics were not slow to expose the tissue of fallacies on which his conclusions rested. It is sufficient to say here that Webster was not the first to propose a convention and to remark that, whatever may have been the merits and originality of his ideas, and some of them, certainly, were not as novel as Mr. Taylor thought, no evidence has been adduced to prove that his pamphlet was mentioned in the Federal Convention, or indeed that any of its members had read it. Mr. Taylor failed ludicrously in the attempt to establish his sensational thesis.

Such theories of the origin and sources of the Constitution all rest upon arguments based on resemblance, conjecture and superficial plausibility. To these history properly resorts only when more satisfactory evidence is wanting. For the sources of the Constitution, however, such evidence is not wanting; we know that the convention made extensive use of certain documents. First and foremost was the Virginia Plan. Madison had much to do with the drafting of this document, but it was really the product of many minds, working, as minds always do, under the pressure and influence of circumstance and environment. It was the basis of the resolutions which the convention adopted and referred to its committee of detail. This committee did not confine itself to elaborating details of slight importance or to matters of mere form and style; on the contrary, its work represents an important stage in the fram-

ing of the Constitution. Next to the resolutions of the convention, which were necessarily the basis of its work, the committee made most extensive use of the much abused Articles of Confederation, from which were taken provisions for the powers of congress, limitations on the states, and interstate privileges. The committee drew also upon the New Jersey and Pinckney Plans and upon the state constitutions, especially the constitution of New York. Even more important than the direct use of these constitutions made by this committee was the indirect influence which they exerted upon the convention. For example, the tripartite division of the powers of the government and the bicameral legislature provided for in the Virginia Plan were derived from the state constitutions; and in the course of debate in the convention members frequently proposed the extension to the sphere of the federal government of what they were familiar with in their own commonwealths. It is to the state constitutions, reaching back to seventeenth-century colonial charters, and to the Articles of Confederation, which were the outcome of earlier colonial experiments in federation, that we should look for the institutional derivation of the Constitution. There is no occasion for indulging in arduous feats of conjecture.

The later history of the United States suggests the question, was there under the Constitution a right of secession? Or, to put it in a different form,

was Calhoun's theory of the Constitution and the Union sound? On legal grounds that theory justified secession and the bombardment of Fort Sumter, as Daniel Webster's theory justified Lincoln's call for troops to suppress rebellion.

From the time of the establishment of government under the Constitution onward there were differences of opinion respecting the nature of the Union. Indeed, the framers of the Constitution themselves were not in complete agreement on this subject. It seems to have been the universal opinion that the new system was something between a league of sovereign states, like the preceding Confederation, and a consolidated republic, like the individual states of the Confederation. In No. 39 of *The Federalist* Madison argued that it was a compound of federal and national elements. In harmony with this view was the prevailing conception of divided sovereignty. In a letter signed by Washington as president of the convention, transmitting the Constitution to congress, we read: "It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all." The idea of divided sovereignty runs through the decisions of the federal courts during the early years of our national history. The term "sovereignty," however, was not used in a precise and invariable sense. Here Justice Story comes to our aid. He tells us in his *Commentaries on the Constitution* that

sovereignty in its largest sense means "supreme, absolute, uncontrollable power," but in a more limited sense, "such political powers as in the actual organization of the particular state or nation are to be exclusively exercised by certain public functionaries without the control of any superior authority." Sovereignty in the broader sense was thought of as vested in "the people," though this expression was not precisely defined; in the narrower sense, it was spoken of as divided between the states and the United States.

When the Constitution was framed and adopted men still thought in terms of the natural-rights philosophy, as they had in the days of the Declaration of Independence and the establishment of the state governments. The problems of 1787 were different from those of 1776, but the fundamentals of Locke's philosophy were still taken for granted. The social compact theory of the state had not yet given way to the organic theory. The Constitution was, therefore, very generally thought of as analogous to the social compact which was assumed to be the basis of all legitimate government, and this analogy was drawn by several members of the Federal Convention. The Virginia ratifying convention, in its ordinance adopting the Constitution, declared "that the powers granted under the Constitution being derived from the People of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression and that every power not granted

thereby remains with them and at their will." This did not imply that a state might secede from the Union; it was merely a restatement of Locke's right of revolution, the resumption by the people of their original liberty. Those who thought of the Constitution as a social compact, however, were not agreed as to how the compact was formed. Some seem to have viewed it as an agreement between the people of the United States forming a single community, others as a compact between thirteen groups of individuals. The latter opinion appears to have been much the more common. It was expressed in the Federal Convention by a number of delegates, and Madison in No. 39 of *The Federalist* wrote that ratification was to be given by the people, "not as individuals, composing one entire nation, but as composing the distinct and independent States to which they respectively belong." What is important to realize is that to the men of the time such a compact was very different from a mere treaty between fully sovereign states, for compact was considered the basis of all government. In a suggestive essay on "Social Compact and Constitutional Construction" Professor A. C. McLaughlin points out that men thinking in terms of compact philosophy "could believe in the establishment of a permanent and indissoluble body politic as the result of agreement between hitherto separate bodies; that they could believe in the permanent binding effect of a law which had its origin in consent." Men were still living, politi-

cally, in the shadow of Locke; they could not deny the ultimate right of revolution, and for Americans in those days to have done so would have savored of treason; but that was very different from claiming a right of secession. It is extremely significant in this connection to note that Madison later used the compact-theory of the Union as an argument against the claims of the state-sovereignty school.

Calhoun's political philosophy was basically different from that of the Fathers. He rejected the natural-rights theory of government and the compromise idea of sovereignty that had prevailed when the Constitution was adopted. He denied the doctrine of the state of nature and the social compact and held that government and civil society were natural to man, not artificially created by him. To him, therefore, there was no analogy between the origin of government in general and the specific agreement by which the Constitution had been adopted. The Constitution was a treaty between the states. He denied, also, that sovereignty could be divided. When the Constitution was adopted the states had either surrendered it entire, or they had retained it unimpaired. Powers appertaining to sovereignty might be divided, and under the Constitution were actually divided between the federal and the state governments, but sovereignty itself was indivisible. The Constitution differed from the Articles of Confederation because it was an agreement between sovereign states as communities, instead of between state

governments. Under it the federal government was not the agent of the state governments, as under the Confederation, but co-ordinate with them, both federal and state governments being the agents of the sovereign states. But sovereignty remained after the adoption of the Constitution precisely where it had been before, in the people of the several states. Calhoun's theory carried with it logically the right of secession. It took firm hold of the South because it afforded to a section that saw itself in a minority what seemed to be the only constitutional means of escape from what came to be regarded as the intolerable tyranny of the majority. But one who studies the history of the formation of the Constitution is obliged to say that the theory rested upon views of government and sovereignty widely different from those that were generally held when the Constitution was adopted. It could be justified historically only by a strained and preconceived interpretation of history. To those who know how common such interpretation has been and is, the theory will, however, occasion no surprise.

But if Calhoun distorted history, it does not follow that Webster took no liberties with it. Webster's argument that the Constitution was a compact between the people of the United States, forming a single nation, was not in harmony with the general opinion in 1787-8, however congenial it may have been to the nationalistic spirit of his own section and generation. In support of his

contention Webster made much of the phraseology of the preamble of the Constitution—"We the People of the United States." "It is established by the people of the United States," said he. "It does not say by the people of the several states." As an index of the character of the Union, the wording of the preamble loses its significance, however, when we learn that the convention unanimously agreed to the form, "We the people of the States of New Hampshire, Massachusetts, etc." as the proper designation of the source of authority, and that the committee of style altered this to the final and familiar form, omitting the names of the states because it could not be foretold which would be the ones to ratify the Constitution. There is no evidence that the committee in changing the wording was inspired by any other motive than this. Webster need not have carried his researches into the origin of the Constitution beyond *The Federalist* to find his theory refuted—and by no less an authority than Madison. But he was pleading in a great cause, and he was too good a lawyer to introduce adverse evidence when his client was the American Nation.

CHAPTER V

THE LAUNCHING OF THE CONSTITUTION

"Governments, like clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined too. Wherefore governments rather depend upon men than men upon governments." The truth thus expressed long ago by William Penn, though it has been lost sight of by many "evolutionary" historians who have applied biological conceptions and hypotheses to the development of political institutions and left out of account the men who make and work them, was fully appreciated by Americans in 1789. The friends of the Constitution had won a victory in the ratification of the Constitution, but its fruits were still to be gathered.

For the Constitution was only a framework, not a finished structure. Neither as a political instrument nor as an economic program was it complete in itself. Everything depended upon the men who were to operate the new government and the character of the measures they should adopt. Federalists did not forthwith abandon all fear, nor did Antifederalists lose all hope, for both knew that governments "go from the motion men give them."

In urging him to accept the presidency Hamilton told Washington that his influence would be no less important in preserving the new government from the future attacks of its enemies than it had been in securing its adoption. As the time for the first congressional elections under the Constitution drew near, Washington, anxiously scanning the political horizon, wrote to a correspondent:

"As the period is now rapidly approaching which must decide the fate of the new Constitution, as to the manner of its being carried into execution and probably as to its usefulness, it is not wonderful that we should all feel an unusual degree of anxiety on the occasion. I must acknowledge that my fears have been greatly alarmed, but still I am not without hopes. . . . There will however be no room for the advocates of the Constitution to relax in their exertions; for if they should be lulled into security, appointments of antifederal men may probably take place; and the consequences which you so justly dread be realized."

Such evidence as this of Washington's, and there is much more to the same effect, seems to dispose of the assertion often made that Antifederalism perished with the ratification of the Constitution. The Antifederalists, it is true, soon jettisoned their opposition to the Constitution itself and concentrated their efforts on opposition to the policies of the Federalists under the Constitution; almost all of them eventually fell under the leadership of

Jefferson and came to form the bulk of the Republican party.

Not a little of the Antifederalist opposition to the Constitution had been caused by the shrewd suspicion that it would become an instrument of class legislation and control. This suspicion was thus expressed by a canny rural delegate in the Massachusetts ratifying convention:

"These lawyers, and men of learning, and moneyed men, that talk so finely, and gloss over matters so smoothly, to make us poor, illiterate people swallow down the pill, expect to get into Congress themselves; they expect to be the managers of this Constitution, and get all the power and all the money into their own hands, and then they will swallow up all us little folks, like the great leviathan, Mr. President; yes, just as the whale swallowed up Jonah. This is what I am afraid of."

The fact that Washington was unanimously elected president of the United States does not mean that partisanship suddenly disappeared from American politics.

"The agitation," wrote John Marshall in his *Life of Washington,* speaking of the conflict over ratification, "had been too great to be suddenly calmed; and for the active opponents of the system to become suddenly its friends, or even indifferent to its fate, would have been a victory of reason over passion, or a surrender of individual judgment to

the decision of the majority, examples of which are rarely given in the progress of human affairs."

The notion that the Constitution was launched in a calm sea, unlashed by the winds of partisanship, must be relegated to the realm of myth. In almost all the states the Antifederalists put up candidates, and a number of them were elected. The Federalists succeeded, however, in securing a large majority of the seats in the first senate and house of representatives. No fewer than eleven members of the senate, all of them Federalists, had been members of the Federal Convention; and of the seventy-eight members of the first congress, not counting those of Rhode Island, which did not ratify the Constitution till 1790, forty-four had been members of the Federal Convention or of the state ratifying conventions, of whom thirty-seven had supported the Constitution. The congressional elections of 1789 were a victory for Federalism almost as important as the adoption of the Constitution had been.

Nor does the evidence support the popular belief that Washington was non-partisan in his appointments. The first chief-justice of the supreme court and his five associates were all strong Federalists who had been advocates of the Constitution in the Federal Convention or in state ratifying conventions; and almost all the federal district judges appointed by Washington in 1789 had supported the Constitution in the state conventions. There

were some distinguished lawyers in the ranks of Antifederalists to executive office. For secretary a federal judgeship. Nor did Washington call Antifederalists to executive office. For Secretary of the treasury he turned first to the staunch Federalist, Robert Morris, and when Morris declined the offer, to Hamilton; he selected General Knox as secretary of war. Of the ardent Federalism of Hamilton and Knox there could be no doubt. The headship of the department of state went to Jefferson, whose support of the Constitution at this time was certainly less enthusiastic than theirs. Still Jefferson had not been identified with Antifederalism; though he had found much in the Constitution not to his liking, he had favored its adoption. He himself said in 1789 that he was neither a Federalist nor an Antifederalist. As attorney general, an office provided for by the Judiciary Act of 1789, Washington appointed Edmund Randolph. Randolph, it is true, had declined to sign the Constitution, but he had been converted to Federalism, and as a member of the Virginia ratifying convention had spoken eloquently in favor of ratification. No doubt Washington was wise in confining his appointments to friends of the Constitution, but the fact that he did so refutes the statement often made that he was non-partisan. The surprisingly large number of members of the Federal Convention and the state ratifying conventions who found their way into the new government justifies us in saying that the "managers" of

the Constitution, to borrow the phrase of the Massachusetts farmer, were men who had taken an active part in its framing and adoption. As legislators, administrators and judges they set about to complete the work which as constitution-makers they had begun.

After providing for the all-important question of revenue by enacting a tariff law, congress turned its attention to constructing a habitable dwelling on the foundation which the Constitution had laid. There had been executive departments under the Articles of Confederation; Robert Morris had served as superintendent of finance, and Jay as secretary of foreign affairs. The framers of the Constitution contemplated, though they did not expressly provide for, new executive departments; and during the summer of 1789 congress passed acts organizing the state, war and treasury departments. Diplomatic, consular and revenue officers were appointed, and the wheels of executive government were set in motion.

The Constitution says nothing of a cabinet, and it was some time before one came into existence. The American cabinet, though unlike its British namesake in its origin, its functions and its relations with the legislature, resembles it in resting wholly on convention. The word "cabinet" does not appear in any act of congress until 1907. The president has never been under legal obligation to call cabinet meetings, and during the World War and President Wilson's absence from the

United States during the Peace Conference, the cabinet as a working institution virtually disappeared.

In the Federal Convention the question of an advisory council received some attention. An outline of the Pinckney Plan, discovered some years ago, indicates that it contained a provision that the executive should "advise with the heads of the different Departments as his Council," and several members of the convention favored the establishment of such a council. A formal proposition was made to create a "council of state," to "assist the President in conducting the public affairs," to be composed of the chief justice of the supreme court and secretaries of domestic affairs, commerce and finance, foreign affairs, war, and marine. Toward the close of the convention, the question of an advisory council, together with other postponed subjects, was referred to a special committee, which provided in its report that the president might "require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." This provision, incorporated without change in the final Constitution, was all that emerged from the discussion of a council in the convention, and its wording conveys no hint of the oral conferences between the president and the heads of departments which we call cabinet meetings. In a pamphlet published shortly after the adjournment of the convention

Charles Pinckney wrote that the President would have the right to regard the heads of the departments that might be created as his council and require their advice and assistance. "By this means," he added, "our Government will possess what it has always wanted, but never yet had, a Cabinet Council." This is probably the first use of the word cabinet in the United States.

The language of the Constitution might be taken to imply that the framers intended the senate to act as an advisory council to the president, for the latter was given power to make treaties and appointments to office "by and with the advice and consent of the Senate." At the beginning of its history the senate, it should be remembered, numbered only 22 members; it was about the size of the present British cabinet—not necessarily too large for confidential conference with the president. On a few occasions, indeed, Washington went in person to the senate to have their counsel with regard to proposed treaties, but the experiment was not successful and did not become a precedent. It soon came to be the custom to submit treaties to the senate only after they had been negotiated, the senate being free to ratify, amend or reject; and only rarely since Washington's administration has the previous advice of the senate been sought in the making of a treaty.

The failure of personal consultation between the president and the senate must have made the former more dependent for advice on the heads of

the executive departments. From the outset, indeed, Washington asked the opinion, oral and written, of his secretaries, but the first evidence of what can be called cabinet meetings was in 1791. In 1793, a critical year in American foreign relations, such meetings became more frequent, and the name "cabinet" came into use.

The Constitution provided for a supreme court, but left its organization, as well as the establishment of inferior federal courts, to the discretion of congress, which, by the Judiciary Act of 1789, organized the supreme court and set up federal district and circuit courts. Neither in this act nor in the Constitution do we find, however, any grant of authority to the supreme court to exercise the great power of passing upon the constitutionality of acts of congress. No proposal to confer such authority on the court came before the Federal Convention, and no vote was taken upon it. This power, which the court has long exercised, is perhaps the most distinctive feature of the American constitutional system.

A proposal contained in the Virginia Plan, that the national executive and a part of the national judiciary should form a council of revision, with power to negative acts passed by the national legislature, was rejected, and a veto was given to the president alone—subject to being overruled by a two-thirds majority of both houses of congress. Some years ago there was much excited discussion in the United States of what those who were

opposed to it were pleased to call judicial tyranny. The "recall of judicial decisions" became a shibboleth of the Progressive Party, and history was duly invoked to prove that the supreme court, in holding acts of congress null and void, was exercising a usurped power, one not granted to it by the Constitution and not intended by the framers to be exercised by it. Dr. Charles A. Beard was moved to go through the records of the Federal Convention and other material throwing light on the opinion of its members, with a view to ascertaining, if possible, their intentions on this subject. In his *Supreme Court and the Constitution* he comes to the conclusion that the majority of the leading members of the convention "believed that the judicial power included the right and duty of passing upon the constitutionality of acts of Congress."

In expounding the functions of the judiciary under the new Constitution, Hamilton, in No. 78 of *The Federalist,* made a powerful argument in favor of that relation of the courts to legislation which has impressed foreigners as the most striking characteristic of the American Constitution:

"Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be

superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests can not be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this can not be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must

be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

It was in the famous case of Marbury *v.* Madison (1803) that the supreme court first asserted its authority to declare void an act of congress repugnant to the Constitution. On the face of it, it may seem strange that Chief Justice John Marshall, whose great political purpose in life was to promote American nationalism and exalt the authority of the federal government, should have delivered such an opinion. It is to be explained by the circumstances of the time. State sovereignty had again reared its head; the Virginia and Kentucky Resolutions of 1798-9 had laid down the doctrine that states might pass upon the constitutionality of acts of congress, and the legislature of Kentucky had declared the Alien and Sedition Acts to be, in their opinion, "palpable violations" of the Constitution; the author of the Kentucky Resolutions, Thomas Jefferson, had been elected president of the United States, and behind him was a Republican majority in congress bitterly hostile to the federal judiciary, which at the time was also

a Federalist judiciary. The doctrine expounded by Hamilton, which had become the accepted creed of the Federalist Party, seemed in danger of being overthrown with the fall of that party, and the doctrine of the Kentucky Resolutions—nullification by state action—put in its place, when Marshall, with great boldness, rescued it and wrote it into American constitutional law in Marbury *v.* Madison. His opinion was little more than a restatement of Hamilton's argument in No. 78 of *The Federalist.* Never again while the supreme court was under Marshall's leadership was the precedent followed, and more than fifty years passed before the court again declared an act of congress unconstitutional. But, though Marshall could not foresee this, it was a two-edged sword that he forged, and the next time that it was unsheathed —in the Dred Scott case—it was wielded in the interest of that state sovereignty which he had labored so valiantly to restrain.

During the process of ratification several of the state conventions, it will be remembered, including those of Massachusetts, Virginia and New York, had proposed amendments to the Constitution. In all, seventy-eight had been offered, and the general expectation that at least some of them would be adopted had materially aided the Federalist cause. In his first inaugural address Washington reminded congress of the question of amendments, declaring that it was for them "to decide how far an exercise of the occasional power delegated by the fifth

article of the Constitution is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them." For some time, however, the Federalist majority in congress showed no disposition to take action. But Madison, a member of the house of representatives from Virginia, no doubt influenced by the strength of Antifederalism in his own state and the agitation there led by the popular Patrick Henry, took the lead in bringing the matter before the house. A number of amendments were reported by a special committee, and before the close of the first session of congress twelve of them received the assent of both houses. Ten, having been ratified by the requisite number of states, went into effect in 1791. They are in the nature of a bill of rights, expressly limiting the powers of the federal government in the interest of individual liberty; the tenth amendment was designed to protect the states from encroachment by the federal government. Not all of the Antifederalists were fully satisfied, but the adoption of these amendments undoubtedly contributed to the disappearance of opposition to the Constitution.

The two laggard states, North Carolina and Rhode Island, soon found their situation outside the new union intolerable. Though they alone of all the states were technically loyal—loyal to the Articles of Confederation—they were treated almost as rebels. North Carolina ratified the

Constitution in November, 1789. Rhode Island held out a while longer, but the neighboring states would have none of its paper money, and the senate of the United States passed a bill to prohibit commerce with it. Finally, in May, 1790, a convention at Newport ratified the Constitution by a majority of two, at the same time proposing no fewer than twenty-two amendments.

On the economic side the Constitution was as incomplete as on the political, and here also the work of the first congress was of basic importance. The Constitution, as we have seen, gave congress the taxing power, but left it for congress to determine whether the federal revenues should be derived principally from direct or indirect taxes, and whether import duties, if they were levied, should be so adjusted as to give protection to American industry. It declared that the federal debt was as valid against the United States under the Constitution as under the Confederation, but the vagueness of its language left room for differences of opinion as to how it should be paid. The question of the assumption by the federal government of the state debts had been considered in the convention, but the Constitution was silent on this subject. The important question of a national bank also had been considered, but of this, too, the Constitution said nothing.

The first necessity of the new government was revenue, the want of which had wrecked the Confed-

eration. The federal treasury was literally empty. For the purpose of federal revenue indirect was preferred to direct taxation, and customs duties to excises. Among the advantages of import duties over other forms of taxation were that they would not conflict with state taxes, since the Constitution had taken from the states the right to levy such duties, and that their collection would involve less espionage and fewer officials than direct taxes or excises. The debates on the tariff of 1789 reveal clearly the clash between the agricultural and the manufacturing interests and sections, and they brought forth a number of arguments that have been the stock in trade of American tariff controversy ever since. New England representatives, in the interest of commerce, shipping and the distilling industry, desired a low duty on molasses and a high duty on rum; Pennsylvania, the leading protectionist state, whose industries had been fostered by a state tariff, wanted a low duty on rum, but high duties on iron and steel; South Carolina asked for a high protective duty on hemp. The protectionists urged that infant industries should be protected, that national industrial independence should be achieved, and that through the encouragement of native manufactures a home market for American agriculture should be built up. The enemies of protection retailed the theoretical arguments for free trade and enlarged upon the benefits that would result from commercial intercourse as free as possible with foreign countries. The

preamble of this first national American tariff shows that the men who were responsible for the measure—and a good number of them had taken part in the framing of the Constitution—thought that protection was constitutional. The fact that the scale of duties was low should not mislead us, for the preamble explicitly states that the protection of American manufactures was one of the purposes of the act. Even Madison, the leader of the free traders in the house, did not deny that protective duties were warranted under certain conditions. The tariff was from the outset a great fiscal success, and for a century and a quarter, in all times that may be considered normal, the federal revenue was derived principally from import duties.

The man who of necessity was most concerned with giving effect to and supplementing the Constitution, considered as an economic program, was the first secretary of the treasury. Other financiers have no doubt excelled Hamilton in knowledge of technical finance, but perhaps none has ever perceived more clearly than he the relation of economics to politics, or more skillfully devised economic means to accomplish political ends. Hamilton was no sentimentalist in his political theory. He believed that the support men give to government is in the nature of a *quid pro quo,* rather than the result of any human instinct of loyalty. Attachment to government could scarcely be regarded as instinctive among a people who had turned disloyal twice within the brief span of a

dozen years. In the course of a long speech delivered in the privacy of a session of the Federal Convention Hamilton enumerated as the first of the principles necessary for the support of government "an active and constant interest in supporting it." He believed that most people are governed by avarice, ambition and interest, and the fact that these passions attached men to their respective states he held to be the chief obstacle to the establishment of a strong national government. The heart and the purse, in his view of human nature, were intimately related, and in all the great measures which as secretary of the treasury he recommended he sought to win for the new government the economic allegiance of those interests and classes whose support he believed essential to its stability. Hamilton has often been called an aristocrat, but it would be more accurate to call him a plutocrat. He had seen the merchants and manufacturers of America, the bondholders and the money lenders, turn against the old constitution and destroy it. Small wonder that he strove to secure their support, above all, for the new.

In his first Report on Public Credit, one of the ablest state papers in American history, Hamilton estimated the total foreign debt of the United States, including arrears of interest, at $11,710,378, the total domestic federal debt at the huge sum of $42,414,085, and the state debts at a round $25,000,000. He thus reckoned a total indebtedness of almost $80,000,000—a staggering figure for

a people numbering less than four millions. The adoption of the Constitution and the establishment of the new government, clothed with the power to levy taxes for the payment of the debt, had given a tremendous impetus to speculation in the depreciated public securities. Hamilton in his Report said that they had risen thirty-three and a third per cent from January to November, 1789, and fifty per cent more from the latter date to January, 1790; and the measures passed by congress in pursuance of his recommendations were to send them still higher. The speculators were to be found mostly in the larger commercial and financial centers in the north. It was generally agreed that the foreign debt should be paid at par according to the precise terms of the contracts, but opinion differed with respect to the domestic debt. Many people, especially in the rural regions where little of the debt was held, thought that it should be scaled down substantially, on the ground that a large part of it had been incurred not for hard money, but for depreciated paper or over-valued goods and services; others thought that it should be paid in full, but with discrimination between original holders and subsequent speculative purchasers, so that the latter should receive something like what they had paid, the balance going to the former. There was pronounced hostility in the country to the speculators and widespread disinclination to see them reap great rewards for their shrewdness at the expense of the original holders,

who were commonly represented as poverty-stricken patriots, often as disabled veterans of the Revolution, who had come forward to help their country in her hour of need. Hamilton proposed to pay the federal debt at par to present holders. Discrimination he vigorously opposed as a breach of contract, ruinous to public credit and unconstitutional. He had something to say about "the immutable principles of moral obligation," but he was not content to rest his case exclusively on that lofty summit. He declared that adequate provision for the support of public credit would "procure to every class of the community some important advantages and remove some no less important disadvantages." No argument was necessary to enlist for his plan the enthusiastic support of the public security holders. The merchants and manufacturers of the country—many of whom were public security holders—and the farmers were assured that a properly funded debt would serve the purpose of currency, augment the fluid capital of the country, and lower the rate of interest, thus promoting American trade, manufactures and agriculture. Anticipating, no doubt, that the principal opposition to his plan would come from the farmers, Hamilton undertook to show that it would be especially beneficial to them.

In the same report the secretary advocated the assumption by the federal government of the state debts incurred in support of the Revolution. The question of assumption was not new. A special

committee of the Federal Convention had reported in favor of it, but their recommendation was not incorporated in the Constitution. Elbridge Gerry of Massachusetts, a member of the convention and a large holder of state securities, asserted in the house of representatives during the course of the debate on assumption, that it "was in contemplation from the very commencement of the new Government." And Hamilton, in a letter to a correspondent, written in 1792, suggested that a provision for assumption had been omitted from the Constitution "from the impolicy of multiplying obstacles to its reception on collateral details." Some of the arguments which he advanced in his Report to justify assumption had been urged in the Federal Convention. His principal motive was probably political. Assumption would be a powerful measure of centralization, for it would cause the state creditors to transfer their economic allegiance to the federal government. Of all his economic projects none illustrates Hamilton's political purpose better than assumption.

The secretary's proposals for funding and assumption had the support of the capitalist interests generally; the opposition came principally from agrarianism. Not all of the old Federalists, who had been on his side in the contest over the ratification of the Constitution, were willing to follow his lead here, and many of them, throughout the country, went over to the opposition. In the house of representatives Madison came forward as the

leader of those who favored a discrimination in the payment of the debt, but he was defeated by a vote of nearly three to one. Assumption, however, was at first beaten in the house. The states which had largely paid off their debts, of which Virginia was the chief, were naturally opposed to a scheme that would shift part of the burdens of the others to their shoulders. The contest was most bitter. In Massachusetts, a state that had a large debt, there were mutterings of secession if assumption was defeated, and in Virginia there were threats of nullification if it was passed. It was finally carried only after a famous "deal" between Hamilton and Jefferson, whereby certain southern votes in congress were given for it in return for northern votes for the location of the proposed federal capital on the Potomac. The vote in the senate on the funding bill with the assumption amendment shows the representatives of the financial and commercial states of Massachusetts, Connecticut, New York and New Jersey, together with South Carolina, unanimous for the measure, those of Virginia, North Carolina, Georgia and Rhode Island unanimously against it, and those of New Hampshire, Delaware, Pennsylvania and Maryland divided. In the house the representatives from Massachusetts, Connecticut, New Jersey and Delaware were unanimous for assumption; those from North Carolina and Georgia were solidly against it; those from New Hampshire, New York, Pennsylvania, Maryland, Virginia and South Carolina were divided.

Soon after Hamilton's great financial measures had been enacted into law, the charge was made by his enemies that they had been carried by the votes of members of congress who were personally interested in their enactment. In a letter to Washington, in September, 1792, Jefferson said that if such members had withdrawn, "as those interested in a question ever should, the vote of the disinterested majority was clearly the reverse of what they made it. . . ." Historians have given more or less credence to such charges, depending on their party sympathies and point of view. Under the Funding Act, passed in August, 1790, the holders of public securities brought their paper to the Treasury or to loan offices in the states to be exchanged for bonds of the new government. Some years ago Dr. Beard, after a careful examination of the treasury records, the results of which are set forth in his *Economic Interpretation of the Constitution* and *Economic Origins of Jeffersonian Democracy,* found that of the fourteen senators who voted for the funding bill with the assumption amendment, ten appear on the Treasury records as holders of public securities, most of them in large amounts; and that of the twelve who voted against it five held public securities, three of them in trifling amounts, while the other seven do not appear on the records. He found the names of nearly half the members of the first house of representatives on the records; and his analysis of the vote in the house on assumption shows that of the thirty-two

members who voted for it, twenty-one were security holders, and that of the twenty-nine who voted against it, eight were security holders. Dr. Beard admits the possibility that some of the members of congress whose names appear on the records may have been acting as attorneys for other persons; but it can scarcely be denied that the facts which he has disclosed substantiate the statement of Jefferson, quoted above.

Second in importance only to his first Report on Public Credit was Hamilton's Report on a National Bank. Some critics of the Articles of Confederation had reckoned it as one of the defects of that instrument that it did not authorize congress to establish such an institution. The question of a bank, nevertheless, does not seem to have received much consideration in the Federal Convention. Madison proposed to confer on congress the power "to grant charters of incorporation where the interests of the United States might require and the legislative provisions of individual States may be incompetent," but the objection was at once made that this would stir up opposition to the Constitution in the country. "In Philadelphia and New York," said Rufus King, "it will be referred to the establishment of a Bank, which has been a subject of contention in those cities. In other places it will be referred to mercantile monopolies." To omit all mention of a bank from the Constitution was no doubt one of the most discreet of the decisions of the convention.

To Hamilton a national bank had long seemed essential to the stability of the government. In a letter to Robert Morris, written as early as 1780, he said: "The only plan that can preserve the currency is one that will make it the immediate interest of the moneyed men to cooperate with the Government in its support." On December 14, 1790, in response to an order of the house of representatives, calling upon the secretary of the treasury to report such further provisions as might in his opinion be necessary for the establishment of public credit, he submitted his famous Bank Report. After enumerating the advantages of a bank, and examining the arguments against it, the secretary submitted a detailed plan. He proposed the establishment of a national bank, with a capital stock of $10,000,000, divided into 25,000 shares of $400 each, each share to be payable one-fourth in specie and three-fourths in the recently funded public securities bearing interest at six per cent. The total debts of the bank, including its notes, were not to exceed the amount of its capital stock; and its bills and notes, payable on demand, were to be received in all payments to the United States. The affairs of the bank were to be under the management of twenty-five directors, chosen annually by the stockholders, the directors to choose one of their number as president. The president of the United States was to be authorized to cause a subscription to the stock to be made on behalf of the United States to an amount not exceeding $2,000,000. The

most significant feature of the plan was that requiring three-fourths of the stock to be subscribed in the form of the public debt. The chief object of this, according to Hamilton, was to make possible "the creation of a capital sufficiently large to be the basis of an extensive circulation, and an adequate security for it."

"When the present price of the public debt is considered," he said, "and the effect which its conversion into bank stock, incorporated with a specie fund, would, in all probability have to accelerate its rise to the proper point, it will easily be discovered that the operation presents, in its outset, a very considerable advantage to those who may become subscribers; and from the influence which that rise would have on the general mass of the debt, a proportional benefit to all the public creditors, and, in a sense which has been more than once adverted to, to the community at large."

The bill to incorporate the First Bank of the United States, drawn on the lines proposed by Hamilton, was passed in 1791, during the last session of the first congress. In the house of representatives the opposition to the bill, which came from the agricultural states south of Pennsylvania, made much of the question of constitutionality, insisting that there was no provision in the Constitution to justify the incorporation of a bank. Led by no less an authority than Madison, their argument was one that had to be met on legalistic

grounds, though many of the supporters of the bill may have agreed with what one of them said, that "constitutionality grows out of expediency." To justify the measure its friends resorted to the doctrine of implied powers. Admitting that the Constitution contained no express warrant to establish a bank, they held that it was covered by the clause giving congress power to make all laws "necessary and proper" for carrying into execution the powers specifically vested in it. After the bill had passed congress, Washington asked for the opinions of his secretaries on the vexed question of constitutionality. In a document which anticipates the reasoning of Marshall in M'Culloch *v.* Maryland (1819), Hamilton, arguing from the "necessary and proper" clause, upheld the constitutionality of the bank, while Jefferson, denying that a bank was "necessary" in the meaning of the Constitution, contended that the power to incorporate banks was reserved to the states.

From Hamilton's point of view the bank was from the outset a brilliant success. Books were opened for subscriptions on July 4, 1791, and—*mirabile dictu*—within two hours the entire capital stock was subscribed. The worst fears of Jefferson and Madison and their followers seemed to be justified by what happened. A mania of speculation carried the stock to a fabulous premium, and brokers in bank "script," as it was called, sprang up on all sides. "Of all the shameful circumstances of this business," said Madison, "it is among the

greatest to see the members of the Legislature who were most active in pushing this job openly grasping its emoluments." That the Bank had the effect of attaching the moneyed interests more closely to the government no one can deny.

Another great report of Hamilton's was calculated to arouse the enthusiasm of the manufacturers. In a Report on Manufactures, submitted on December 5, 1791, the secretary enumerated seventeen branches of industry that were already flourishing in the United States; and among the means proper to be taken for the encouragement of these and other kinds of manufacture he suggested duties and prohibitions on the importation of competing products, exemption of the raw materials of manufacture from import duty and prohibition of their exportation, bounties, and the encouragement of inventions. To show that it was to the interest of the community, considered as consumers, to encourage the growth of domestic manufactures, he delivered himself of this remarkable pronouncement in economics:

"When a domestic manufacture has attained to perfection, and has engaged in the prosecution of it a competent number of persons, it invariably becomes cheaper. Being free from the heavy charges which attend the importation of foreign commodities, it can be afforded, and accordingly seldom [or] never fails to be sold, cheaper, in process of time, than was the foreign article for which it is a substitute."

The secretary evidently deemed it unnecessary to prove that his policy would benefit the manufacturers themselves, but agrarian support for protection was sought by the argument that it would result in the creation of a growing home market for agricultural produce. As for the sectional opposition to protection, on the ground that it would sacrifice the interests of the purely agricultural to those of the manufacturing states, he sought to reassure the former by laying it down as a maxim that the "aggregate prosperity of manufactures" and the "aggregate prosperity of agriculture" were intimately connected. Suggestions of a "contrariety of interests" between the north and the south he pronounced unfounded and deplorable, "unfriendly to the steady pursuit of one great common cause, and to the perfect harmony of all the parts."

In defending the constitutionality of bounties Hamilton fell back on implied powers. Congress was given authority by the Constitution "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States," and according to Hamilton it was left to the discretion of congress "to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper." Madison declared that such an interpretation of the Constitution would change the character of the federal government, making it "no

longer a limited one possessing enumerated powers, but an indefinite one, subject to particular restrictions."

To one of Hamilton's measures the opposition went to the length of an insurrection that put the Constitution and the new government to the test. Assumption of the state debts necessitated additional revenue, and congress, following the secretary's recommendations, imposed excise duties on spirits distilled in the United States. These bore with especial severity on the frontier communities of Pennsylvania, Maryland, Virginia and North Carolina, where whiskey distilled from the native grain was not only highly esteemed as a beverage, but was an important article of commerce and even a medium of exchange. Only in the concentrated form of whiskey could the grain produced in these remote regions be conveniently transported to a market. The legislatures of Pennsylvania, Virginia, Maryland and North Carolina protested against the Excise Bill, and from the outset the opposition to it assumed menacing proportions. An act passed in 1792, abolishing the tax on smaller stills, seems to have allayed the discontent in Virginia and North Carolina. But in the western counties of Pennsylvania, where Antifederal hostility to the Constitution had not disappeared, the authority of the federal government was defied. Public meetings kept popular indignation at a high pitch, and bands of "Whiskey Boys" visited various forms of "direct action" upon those proprietors of

stills who showed a disposition to obey the law. It was a special cause of complaint that warrants for the arrest of persons violating the law were returnable in Philadelphia, hundreds of miles away. Actual insurrection, accompanied by bloodshed, broke out in July, 1794. To Hamilton this was a rebellion that must be suppressed by a display of force; and perhaps he was not wholly displeased that the time had come for the new government to show its power. At any rate, he in person accompanied an army composed of militia from the states of New Jersey, Pennsylvania, Maryland, and Virginia, called into the service of the United States and sent by the president to the disaffected region to restore order. The secretary of the treasury did not have the pleasure of witnessing the suppression of the insurrection, for it had collapsed before the army reached its destination, but he was able to direct a number of arrests. Eventually two of the rebels were convicted of treason, but both were pardoned by Washington. The vigorous action taken by the federal government in dealing with the Whiskey Insurrection affords significant contrast with the pusillanimous behavior of the old congress at the time of Shays's Rebellion,—a contrast that measures the distance along the road of nationality travelled by the United States during the brief period of eight years.

Students of American history have frequently commented on the popular reverence with which the

Constitution came very soon to be regarded by all classes and parties in the United States. Woodrow Wilson did not exaggerate when he said: "The divine right of kings never ran a more prosperous course than did this unquestioned prerogative of the Constitution to receive universal homage." Von Holst, in his *Constitutional and Political History of the United States,* devotes a chapter to "The Worship of the Constitution and its Real Character." This cult of the Constitution evidently needs to be accounted for, since veneration for paper constitutions in general was not instinctive in Americans, as the history of the Confederation very clearly shows. Constitution-worship was not synonymous with patriotism, for it was the most patriotic Americans who were most open in their criticism of what it was the fashion to call the "imbecilities" of the Articles of Confederation.

It is not strange that the Federalists should have exalted their own handiwork, but Antifederalists were soon vying with them in doing homage to the instrument which they had so recently been denouncing. In opposing Hamilton's financial policies they asserted that the secretary of the treasury was aiming at the destruction of the Constitution, and that it was their mission, as one of them said, to restore it to its "pristine health and proper functions." Jefferson, who welded the ill-organized Antifederalist hosts into a disciplined political army, proclaimed himself the true defender of the faith. Hamilton and his friends were

"monocrats," seeking to distort the Constitution for their own personal and party benefit. At the time of the Kentucky Resolutions, which Federalists regarded as a deadly thrust at the vitals of the Constitution, he wrote: "A little patience, and we shall see the reign of witches pass over, and the people recovering their true sight, restoring their government to its true principles." To Jefferson the "revolution of 1800," as he called the election that carried himself and his friends to power, signified the restoration of the Ark of the Covenant to its rightful place in the sanctuary of democracy. Even the secessionists of 1860 were not apostates from the cult of the Constitution—the original Constitution of the Fathers. It was because the north, to their way of thinking, had violated the Constitution, had deprived the south of rights to which it was entitled under the Constitution, had refused to accept as final the supreme court's interpretation of the Constitution—it was for this and for injuries anticipated that they invoked the ultimate remedy of secession, a constitutional remedy, as they insisted. Jefferson Davis did not yield to Abraham Lincoln in his reverence for the Fathers and their work.

A present-day apologist for medievalism tells us that the trouble with modern life is that it has substituted contractual for sacramental relations. One who turns from the matter-of-fact debates in the Federal Convention to the Fourth of July orations, the sermons and even the judicial deci-

sions of the following decade, is likely to feel that America reversed the process. What caused this mirage in which the "bundle of compromises" that issued from the Philadelphia conclave, and was adopted only after the bitterest partisan conflict, was transformed into the solemn pronouncement of a whole people, unswayed by passion and partisanship, an embodiment of the ultimate verities in politics so marvellous as strongly to suggest direct Divine inspiration in its production? Why were Americans soon ascribing to the Constitution a finality which none of the framers had claimed for it?

First among the factors making for the apotheosis of the Constitution I place the prosperity with which it was associated. The weakness of Von Holst's discussion of the subject, in my judgment, is that he gives no adequate recognition to this factor. Writing in June, 1788, to Lafayette, Washington said:

"I expect that many blessings will be attributed to our new government, which are now taking their rise from that industry and frugality, into the practice of which the people have been forced from necessity. I really believe, that there never was so much labor and economy to be found before in the country as at the present moment. If they persist in the habits they are acquiring, the good effects will soon be distinguishable. When the people shall find themselves secure under an energetic government, when foreign nations shall be disposed to give

us equal advantage in commerce from dread of retaliation, when the burdens of war shall be in a manner done away by the sale of western lands, when the seeds of happiness which are sown here shall begin to expand themselves, and when everyone, under his own vine and fig-tree, shall begin to taste the fruits of freedom, then all these (for all these blessings will come) will be referred to the fostering influence of the new government. Whereas many causes will have conspired to produce them. . . ."

To Jefferson, in August of the same year, he wrote:

"I will just touch on the bright side of our national state . . . and we may perhaps rejoice, that the people have been ripened by misfortune for the reception of a good government. They are emerging from the gulf of dissipation and debt, into which they had precipitated themselves at the close of the war. Economy and industry are evidently gaining ground. Not only agriculture, but even manufactures, are much more attended to than formerly. Notwithstanding the shackles under which our trade in general labors, commerce to the East Indies is prosecuted with considerable success. . . . The voyages are so much shorter, and the vessels are navigated at so much less expense, that we may hope to rival and supply, at least through the West Indies, some part of Europe with commodities from thence. This year the exports from Massachusetts have amounted to a great deal more than their imports."

Two years later, in May, 1791, Jefferson wrote:

"In general, our affairs are proceeding in a train of unparalleled prosperity. This arises from the real improvements of our government, from the unbounded confidence reposed in it by the people, their zeal to support it, and their conviction that a solid union is the best rock of their safety, from the favorable seasons which for some years past have cooperated with a fertile soil and a genial climate to increase the productions of agriculture, and from the growth of industry, economy and domestic manufactures; so that I believe I may say with truth, that there is not a nation under the sun enjoying more present prosperity, nor with more in prospect."

Surely Professor Farrand does not exaggerate in saying that the Constitution was "floated on a wave of commercial prosperity." Washington's annual addresses show that he was keenly sensitive to the political importance of prosperity and its effects in fostering attachment to the new government. The fact seems to be clearly established that, quite independent of political changes, the country was recovering from a period of economic depression. The Constitution did not create the new prosperity, except indirectly by increasing confidence, but it reaped the full benefit of the *post hoc ergo propter hoc* argument.

As a second factor in the establishment of the cult of the Constitution I suggest patriotism, though this alone would not have enabled the new

system to weather severe and prolonged business depression. In the contest over ratification the Federalists had urged with great effect that the only alternative to the adoption of the Constitution was the dismemberment of the Union, and they had driven their argument home. Americans identified the Constitution with the preservation of the union. Furthermore, granted a modicum of prosperity, a people's patriotism can be counted upon to exalt its own above all other governments, and the comparisons which Americans then made tended especially to such invidious distinctions. When they looked abroad they saw not orderly republics or democratic monarchies, but despotisms, aristocracies, Jacobinical excesses and military imperialism, with its train of ruin. Small wonder they thought the Constitution a light to lighten the world.

Another factor was what we may call the "silences" of the Constitution. Had it been more explicit in all cases, had the intent of the framers been always clearly expressed, had it borne on its face clearer evidence of the economic struggle through which it was established, it could not have been so readily appealed to and cherished by both parties. The Constitution makes no mention of a number of matters that were considered in the Philadelphia Convention and that later became subjects of acute party conflict—the assumption of state debts, for example, and the establishment of a national bank. When, therefore, assumption and the bank came up as party measures under the

Constitution it was possible alike for those who advocated and those who opposed them, while bitterly contending with one another, to appeal to the same document in defence of their respective positions. Again, the large majority of the framers were certainly opposed to universal manhood suffrage, but their attitude toward it was not betrayed in the document which they drafted. Aristocrats and democrats could both stand on the broad bottom of the Constitution.

Nor was the support given the Constitution by the clergy, the lawyers and the school teachers a negligible factor in establishing and transmitting the tradition. In sermon, in ceremonial oration and in the class room they led the popular chorus of national laudation. And finally—I am not, of course, attempting an exhaustive analysis—the fact that for fifty years after the adoption of the Constitution the public had no opportunity of knowing *how* it had been framed, was distinctly favorable to the growth of a legend. *Omne ignotum pro magnifico.* Open covenants openly arrived at might have their advantages, but they would not make for popular veneration of the covenants.

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